TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1880.

No. 253.

JOHN D. ALEXANDER, PLAINTIFF IN ERROR,

vs.

FRANCES L. BRYAN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ALABAMA.

FILED MARCH 31, 1881.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 233.

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vs.

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ALABAMA.

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1 *Summons and Complaint.*

UNITED STATES OF AMERICA.

Circuit Court of the United States for the Southern District of Alabama.

The President of the United States to the Marshal of said District, greeting:

You are hereby commanded to summon John D. Alexander, who is a citizen of the State of Alabama, to appear before the circuit court aforesaid, at the place of holding said court, at Mobile, on the first Monday of June next, then and there to answer the complaint of Francis L. Bryan, who is a citizen of the State of Texas, and have you then and there this writ.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court this the 12th day of February, in the year of our Lord one thousand eight hundred and seventy-nine.

[SEAL.]

2 Issued the 14th day of February, in the year of our Lord one thousand eight hundred and seventy-nine.

Attest: N. W. TRIMBLE,
Clerk C. C. Southern District of Alabama.

UNITED STATES OF AMERICA.

Circuit Court of the United States for the Southern District of Alabama.

FRANCES L. BRYAN, Pl'ff,
vs.
JOHN D. ALEXANDER, Def't. } To June Term, 1879.

Frances L. Bryan, the plaintiff, who is a resident citizen of the State of Texas, complains of John D. Alexander, the defendant, who is a resident citizen of Marengo county, in the State of Alabama, of a plea that he render to the said plaintiff the sum of one hundred thousand dollars, which he owes to and unjustly detains from said plaintiff; for that whereas heretofore on, to wit, the 22d day of Novem-

3 ber, A. D. eighteen hundred and fifty-eight, in the county of Marengo aforesaid, one John A. C. Horn was, by the judge of the probate court of said Marengo county, duly qualified as executor of the last will and testament of one John Horn, then lately deceased testate; whereupon the said John A. C. Horn and the said John D. Alexander and a certain W. B. Lessuer made their certain writing obligatory of date the 22d day of November, A. D. 1858, in said county, signed with their names, sealed with their seals, and therein and thereby acknowledged themselves to be held and firmly bound to J. A. Young, judge of the probate court of said Marengo county, in said State of Alabama, and his successors in office, in the penal sum of one hundred thousand dollars; for which payment well and

truly to be made said defendant, as well as said John A. C. Horn and said W. B. Lessuer, bound themselves, their heirs, executors, ad-
4 ministrators jointly and severally, which said writing obligatory was subject to a certain condition therein underwritten, that whereas the said John A. C. Horn had the day of the date of said writing been duly appointed executor of the last will and testament of John Horn, deceased; if the said John A. C. Horn should and did well and truly perform all the duties which were or might be by law required of him as such executor their said obligation to be void, otherwise to remain in full force. And the plaintiff avers that after said defendant had executed his said bond, and while the same was in full force and effect, to wit, on the 10th day of June, 1877, a day in term time, there was entered and rendered in the circuit court of the United States for the southern district of Alabama, sitting in equity, the said court having entertained jurisdiction of said estate of John Horn, deceased, and of the administration thereof and the
5 final settlement of the same upon bill therein filed for that purpose by legatees of said John Horn against said executor, said John A. C. Horn, and said defendant, John D. Alexander, and others; and while possessed of such jurisdiction, and upon appropriate proceedings for that purpose, a final decree in favor of plaintiff as one of the legatees of said John Horn under his said will, and against said John A. C. Horn as executor of said last will and testament of said John Horn, deceased, for the sum of forty-two hundred and ninety-two $\frac{1}{100}$ dollars besides her costs; that said decree is and remains in said court unreversed and wholly unsatisfied, and that divers goods and chattels and assets of the said John Horn's estate came into the possession of said John A. C. Horn, as such executor, to be administered, to wit, of the value of one hundred thousand dollars, to wit,
6 in said county, more than sufficient to satisfy said decree, yet the said John A. C. Horn did not well and truly execute said last will and testament and administer said assets, and did not pay said decree or any part of the same with the avails of the said goods, chattels, and assets, or otherwise, but wasted the same and converted them to his own use, to wit, on the first day of July, 1877. And plaintiff avers that said John A. C. Horn did not well and truly perform all the duties which were by law required of him as executor aforesaid, but violated said condition of said bond above set forth, by reason of which said several premises the plaintiff has sustained damages to a large amount. And by means of which premises also the said writing obligatory became forfeit, and thereby an action accrued to plaintiff to demand of and from the defendant said sum of one hundred thousand dollars above demanded; yet the said de-
7 fendant has not, nor has either the said John A. C. Horn, nor the said N. B. Lessuer paid said plaintiff said sum above demanded, nor any part thereof, though often requested so to do, but this both and still doth refuse, to the damage of said plaintiff five thousand dollars, and therefore she brings her suit.

(S'g'n'd) STEWART & PILLANS,
Pl'ffs Att'ys.

Marshal's Return.

Received in office, this seventh day of March, 1879.
(Signed) GEORGE TURNER,
U. S. Marshal.

Executed by serving copy of the within summons and complaint on the defendant, J. D. Alexander, this the 25th day of March, 1879.
(Signed) GEORGE TURNER,
U. S. Marshal.
By J. H. DIXON, *Deputy.*

Continuance.

TUESDAY, *June 17th*, 1880.

Court met pursuant to adjournment. Present, Hon. Wm.
8 B. Woods, judge United States circuit court, and Hon. John Bruce, judge United States district courts for the State of Alabama.

* * * * * *

FRANCIS L. BRYAN
vs.
JOHN D. ALEXANDER. } No. 599.

This cause is continued until the next term of the court.

Pleas of Deft.

Circuit Court of the United States, Fifth Circuit, Southern District of Alabama.

FRANCIS L. BRYAN *vs.* JOHN D. ALEXANDER.

Comes the defendant, John D. Alexander, and by leave of the court, for answer to the complaint in this cause, pleads the several pleas following, to wit:

First. He did not undertake, in manner and form as is in
9 said complaint alleged and set forth; and that he does not owe the debt claimed of him in said complaint.

Second. And for a further plea the defendant says *actio non;* because, he says, more than six years from the time of any act done or omitted by said John A. C. Horn, which fixed the liability of this defendant as surety on the bond given by said Horn, as executor of the will of John Horn, deceased, as alleged in the complaint, had elapsed before the commencement of this suit; and that the alleged right of the plaintiff, as set forth in his complaint, did not accrue within six years next before the commencement of this suit. Wherefore the defendant says that this suit is barred, and the plaintiff's right of recovery, by the statute of limitations of six years in such cases declared by the laws of Alabama.

Third. And for further plea, the defendant says *actio non;* because,

he says, the executor, John A. C. Horn, named in the complaint
10 as executor of the last will of John Horn, deceased, heretofore,
to wit, on the second day of May, 1864, in the probate court of Marengo county, in the State of Alabama, from which county his letters testamentary were issued, and which, at the time, had full jurisdiction over said decedent's estate and the administration thereof in the hands of said executor, made a final settlement of his administration as such executor; and thereupon, after due and proper notice of such settlement had been given, a final decree on such administration was rendered by said court, on said second day of May, 1864. Whereupon the amount due from said executor, as such, to the plaintiff and the other legatees and devisees, under said will, was fully ascertained, determined, and declared, and thereby the liability of said executor to the plaintiff was judicially ascertained by said court,
11 which the defendant says was a court of competent jurisdiction for that purpose, and the right of the plaintiff to prosecute her suit against the defendant, as surety on the bond of said executor, as alleged in the complaint, for the recovery of the money so ascertained and adjudged to be due to her by said executor, was also thereby fixed. But the plaintiff did not commence the present suit within six years next after the second day of May, 1864, when it became the duty of said executor to pay her the money so ascertained to be due her, but has allowed more than six years therefrom to elapse before the commencement of this suit, to wit, 14 years, 9 months, and 12 days. The defendant further shows and says that said decree of May 2d, A. D. 1864, is unreversed and of full force and effect,
and that the decree of the circuit court of the United States of
12 the 10th day of June, A. D. 1877, in favor of the plaintiff and against the aforesaid executor, is not the first decree on which the plaintiff's right of action against this defendant commenced and vested; but that said decree was rendered to enforce payment of said decree of the probate court of Marengo county, as aforesaid, against said executor, and rested on said decree and its validity. Whereupon the defendant says the plaintiff is barred of his right of action against this defendant by the statute of limitations of six years, as is provided in such cases by the laws of Alabama, as set forth in section 3226, par. 7, of the Code of Alabama, and that she should not maintain the same.

Fourth. For a further plea the defendant says *actio non;* because he says, confessing the qualification of John A. C. Horn as the executor of John Horn's will, in the probate court of Marengo county,
Alabama, the execution of the bond, with this defendant as
13 surety, conditional, as charged—the rendition of the decree of June 10th, 1877, against said executor mentioned in the complaint; and that the same is unsatisfied, as charged in the complaint; yet the defendant, for the avoidance of these several matters so confessed, says said decree was not the decree on the final settlement of said executor's administration of his testator's estate, by which the duty of said executor to pay the plaintiff the sum due

to her by him as such executor was first ascertained, and her right to recover the same of him was fixed and declared; but that such duty and right had been ascertained and declared long before said tenth day of June, 1877, to wit, on and before the second day of May, 1864, by decrees of the probate court of Marengo county, in the State of Alabama, which said court of probate was a court of competent jurisdiction, touching said matters, and its said
14 decrees were rendered on proceedings regularly instituted to that end; and by said decree of 2d of May, 1864, the amount due the plaintiff by said executor and her right to sue for and recover the same, as against the defendant, were then ascertained, determined, and fixed by a court of competent jurisdiction. The defendant further says that said decree of the 10th day of June, 1877, is based upon said decree of the 2d day of May, 1864, and a decree of said court in 1860, and on the validity thereof, which decrees are in words and figures, as follows:

"*Decree on Partial Settlement.*

"Probate Court, Special Term held the 21st day of May, 1860. Judge Young, presiding. Estate of John Horn, dec'd.

"This day came John A. C. Horn, executor of the will of said deceased, by attorney, and likewise came Charles J. C. Lockhart
15 and Narcissa his wife, William Lockhart and Sarah his wife, and William McPhail and Mary R. his wife, and Frances L. Bryan, by their several attorneys.

"And the account and vouchers of said executor for partial settlement, with the exceptions thereto, being by the court restated, it appears to the satisfaction of the court that notice of the time and place of said settlement has been given by publication for three successive weeks in the Linden Jeffersonian, and that said cause has been regularly continued to the present time of this court. It further appears, that after charging said executor with all wherewith he is properly chargeable and allowing him all just credits, there remains subject to distribution the sum of $10,783.50 derived from the real estate of said testator, and by him directed in his last will to be distributed equally among the said Narcissa Lockhart, Sarah Lockhart, Mary R. McPhail, Frances L. Bryan, and Elizabeth P.
16 Dumas, the respective shares of each being $2,156.70 dollars.

It further appears that there remains on the several accounts with the personal estate of said testator a balance of $5,159.11 dollars, which Mrs. Rebecca Horn, widow of said testator, and who has dissented from the will, is entitled to $\frac{1}{6}$, to wit, $1,159.02 dollars, leaving to be distributed among the legatees $4,636.09. It further appears that, after certain specific legacies, including the real estate hereinbefore specified, to be charged against the said legatees the following advancements made by him in his life time, to wit, to Mrs. Narcissa Lockhart the sum of $3,400 dollars; to Mrs. Sarah Lockhart the sum of $4,400 dollars; to Mrs. Mary R. McPhail the sum

of $6,300 dollars; to Mrs. Frances L. Bryan the sum of $8,250 dollars; to Mrs. Elizabeth P. Dumas the sum of $8,614 doll's, and to John A. C. Horn the sum of $1,650, making in the aggregate
17 the sum of $32,614 doll's advanced by him, and directs all the remainder of his property to be equally divided among the said legatees above named, taking into account the advancement so made to them as aforesaid. It further appears that shares to the value of $65,700 have been divided, and the amount of $13,145 in value of said shares have been allotted and set off to Mrs. Rebecca Horn, widow as aforesaid, being thirty-five doll's more than her fifth thereof and value. And that shares of the value of $52,525 dollars have been allotted and set off to said legatees as follows, to wit: to said Narcissa Lockhart shares of the value of $11,650 dollars; to Sarah Lockhart shares of the value of $9,475 doll's; to Mary R. McPhail shares of the value of $8,250 doll's; to said Frances L. Bryan shares of the value of 5,300 dollars; to Elizabeth P. Dumas shares of the value of $5,250 dollars; to said John A. C. Horn
18 shares of the value of 3,600 dollars. It further appears that, after deducting the share of said Robecca as aforesaid in the said balance in cash derived from the personal estate and in the shares as allotted to her, and adding the balance of the said sum in cash as charged against said administrator to the value of said advancements and said shares so allotted to said legatees, the equal share of each in the aggregate of said sums amounts to 14,963 dollars; and that, after adding to the share Narcissa Lockhart, Sarah Lockhart, Mary R. McPhail, Frances L. Bryan, and Elizabeth P. Dumas, their share of the real estate as aforesaid, their respective shares amount to 17,119.91 dollars each.

"It further appears that the said executor has delivered to the said widow and to the said legatees, except the said Francis L. Bryan, the shares allotted to them, as aforesaid; and that he has paid and advanced to and for and on account of said Charles
19 Lockhart and wife the sum of $2,136.62 dollars; to and for and on account of said William Lockhart and wife the sum of $2,636.62 doll's; to and for and on account of said McPhail and wife the sum of $2,136.62 doll's; and to and for and on account of said Frances L. Bryan the sum of $850.79 doll's; and to and for and on account of said Elizabeth P. Dumas the sum of $2,324.62 doll's; and that he has also advanced to said Rebecca Horn, as aforesaid, the sum of 394.26 dollars.

"It further appears that, after deducting the amount after advancements made, respectively, by said testator, and value of shares delivered, and the several sums so, respectively, paid to and on account of said legatees by said executor, as aforesaid, all of which will more particularly be seen by reference to the account, as stated aforesaid, there remains due to said legatees the following sums, for which they are entitled, respectively, to decrees, to wit: To
20 said William and Sarah Lockhart, $608.09 doll's; to said William McPhail and Mary R., his wife, the sum of $433.09

doll's; to Frances L. Bryan the sum of $2,700.18 doll's; to said Elizabeth P. Dumas the sum of 928.09 dollars; and that there also remains to said Rebecca Horn the sum of $729.76 doll's. It further appears that said Charles Lockhart and wife have received and been advanced the sum of $66.91 doll's more than their share of the real and personal estate, as heretofore ascertained and declared. It further appears that John A. C. Horn, after deducting the amount advanced by testator and the value of the shares allotted to him from his share of the personal estate, as hereinbefore ascertained, is entitled to retain the sum of $713.00 doll's to make his equal share under the will of said testator.

"It is therefore adjudged, ordered, and decreed by the
21 court that the account and vouchers of said executor, as stated as aforesaid, be allowed and received as partial settlement of said estate; and it is further ordered and decreed that said Rebecca Horn, widow, as aforesaid, recover of said John A. C. Horn, executor, as aforesaid, the said sum of $729.76 doll's, so found to be due her, as aforesaid; that said William Lockhart and wife recover of said executor said sum of $608.09 dollars, so found to be due them, as aforesaid; that said William McPhail and wife recover of said executor said sum of $433.09 doll's, so found to be due them; and that said Elizabeth P. Dumas recover of said executor the said sum of $928.09 doll's, so found to be due her, as aforesaid; and it being made to appear that there is a suit now pending in the chancery court of ——— county, in the State of Alabama, where the right of the possession of the slaves and property, herein ascertained
22 to be the share of said Frances L. Bryan, is contested with her husband, Leonidas L. Bryan, it is therefore ordered and decreed by the court that said John A. C. Horn, executor, as aforesaid, hold and retain the slaves so allotted to said Frances L. Bryan, and the balance in cash, as hereinbefore ascertained to be due her, subject to the further order and decree of this court, to be made on the determination of said chancery court; and it is further ordered and decreed that said John A. C. Horn retain to his own use the said sum of $713.01 dollars, so ascertained to be due him to make the equal share, as aforesaid.

"(Signed) JAMES A. YOUNG, *Judge.*"

Decree of Probate Court, May 2, '64.

"STATE OF ALABAMA, *Marengo County:*

"In the matter of the final settlement of the estate of John Horn, deceased.

23 "Probate Court, Special Term, May 2d, 1864.

"This day came John A. C. Horn, executor of the last will and testament of John Horn, deceased, and it appearing that John A. C. Horn has heretofore filed his account and vouchers for a final settlement of said estate, and that notice of the time and place of

said settlement has been given by publication for three successive weeks in the Linden Jeffersonian, a newspaper published in said county, the said account and vouchers came on this day to be heard; and it appearing that said executor has filed a list of the heirs and legatees of said deceased, all of whom are of full age and of sound mind, and said account and vouchers being by the court audited and stated, showing a balance on the general account with said estate of two thousand three hundred and eighteen $\frac{86}{100}$ dollars in his hands, subject to distribution, derived from the personal estate of said deceased, of which Rebecca Horn, the widow of said deceased, who has dissented from the provisions of his will, is entitled to one-fifth, amounting to four hundred and sixty-three $\frac{77}{100}$ dollars, and each of the other legatees one-sixth of the remainder, amounting to three hundred and nine $\frac{18}{100}$ dollars; and that he has a further balance of four thousand nine hundred and thirty-three $\frac{14}{100}$ dollars, derived from the real estate sold by direction of said testator, and the proceeds thereof devised to Narcissa M. Lockhart (wife of C. J. C. Lockhart), Sarah A. Lockhart (wife of William Lockhart), Elizabeth P. Dumas, Mary R. McPhail (wife of William McPhail), and Frances L. Bryan, the share of each in the balance of the proceeds of the land aforesaid being $986.60 doll's. It further appears that said executor has fully administered said estate and has discharged all the specific legacies and distributed the slaves according to the provisions of said will, and has invested the money of said estate in four per cent. Confederate bonds. It is therefore adjudged, ordered, and decreed by the court that said account and vouchers as stated be passed and allowed as a final settlement of said estate. It further appears that said executor has advanced to Narcissa Lockhart, in part of her distributive share of said balances from the real and personal estate, the sum of eighty-eight $\frac{61}{100}$ dollars, leaving still due her twelve hundred and seven $\frac{17}{100}$ dollars. It further appears that said executor has advanced to said Mary McPhail (wife of Wm. McPhail) the sum of two hundred and thirteen $\frac{15}{100}$ dollars, leaving still due her the sum of one thousand and eighty-two $\frac{63}{100}$ dollars on account of her distributive share of the balance of the personal and real estate aforesaid And it further appears that said executor has advanced to the said Frances L. Bryan in part of her share of said balances the sum of three hundred dollars, leaving still due to her the sum of nine hundred and ninety-five $\frac{78}{100}$ dollars. It further appears that said Elizabeth P. Nabors has intermarried with one B. O. Nabors, and the said executor now here moves the court that said B. O. Nabors and Elizabeth P. Nabors, his wife, be required to execute a bond for the payment and delivery of the share of the said estate to which the said Elizabeth P. appears to be entitled as aforesaid, to the persons who may be entitled to the remainder upon the termination of the life estate of the said Elizabeth; and it appearing from the will of the deceased that the portion of the estate of said testator bequeathed and devised to said Elizabeth

P., in the event 'she should die and leave no child' or children surviving her, it is [his] will that her portion of his property
27 shall go back to her brother and sisters, and her present or any other future husband shall have no part of it.

It is ordered and decreed that said motion be continued, and notice thereof be given to Elizabeth P. and B. O. Nabors, and that said executor retain the share of the said Elizabeth P. in said balance until said motion be heard and determined by the court; and it is further ordered, adjudged, and decreed by the court that said John A. C. Horn, executor as aforesaid, pay to said Rebecca Horn, widow aforesaid, the said sum of $463.77 as her one-fifth of said balance of the personal estate as aforesaid in the bonds of the Confederate States so invested by him as aforesaid.

It is further ordered and decreed by the court that John A. C. Horn, executor, &c., pay to Charles J. C. Lockhart and Narcissa M., his wife, the said sum of twelve hundred and seven $\frac{17}{100}$ dollars, so remaining due them as aforesaid, in Confederate bonds
28 as aforesaid.

It is further ordered and decreed by the court that said John A. C. Horn pay to said Wm. Lockhart and Sarah A., his wife, the said sum of twelve hundred and ninety-five $\frac{78}{100}$ dollars, their share of the real and personal estate aforesaid in said bonds of the Confederate States.

It is further ordered and decreed that said John A. C. Horn pay to said William McPhail and Mary A., his wife, the said sum of one thousand and eighty-two $\frac{63}{100}$ dollars, so remaining due them as aforesaid, in bonds of the Confederate States as aforesaid.

It is further ordered and decreed that said John A. C. Horn, executor, &c., pay to said Frances L. Bryan the said balance of nine hundred and twenty-five $\frac{78}{100}$ dollars, so remaining due her as aforesaid, in bonds as aforesaid.

It is further ordered and decreed that said John A. C. Horn retain the sum of three hundred and nine $\frac{18}{100}$ dollars as his share of balances from the personal estate aforesaid. And it is further
29 ordered and decreed that said John A. C. Horn, as executor, retain in his hands the said balance of $1,295\frac{78}{100}$ dollars devised to said B. O. Nabors and wife, subject to the further order and decree of this court upon the determination of the motion of said Horn. And said John A. C. Horn now here files his resignation as executor of said estate, which is ordered to be filed and recorded.

(Signed) JAMES A. YOUNG, *Judge, &c.*

The amount thereof was ascertained and fixed by said decrees of said probate court, and is for the amounts so ascertained and fixed by said probate court, with interest thereon; and that said decree of June 10th, 1877, mentioned in the complaint, is not the decree under which the right of action in the plaintiff against the defendant, as surety on the bond of said executor, first arose and

30 commenced, but that such right arose under and commenced with said decrees of the probate court of Marengo county, as aforesaid, rendered on and before the second day of May, A. D. 1864, as shown by said decrees, and that the decree of June 10th, 1877, was merely to enforce payment to the plaintiff out of said executor of the amounts decreed to be due her by the said decrees of said probate court. And the defendant says that more than six years have elapsed from the said second day of May, A. D. 1864, to wit, 14 years, 9 months, and 12 days, to the time when this suit was commenced, and that the same was barred by the statute of limitations in such cause made and provided by the laws of Alabama; wherefore the defendant says the plaintiff cannot maintain such suit against him.

5th. For further plea the defendant says *actio non;* because, he says, the cause of action of the plaintiff against this defend-
31 ant did not "arise with and depend on the decree of the tenth day of June, 1877, mentioned in the complaint, but that the same arose with and commenced under or before the decree of May the 2d, 1864, which the defendant says was rendered by the probate court of Marengo county, in the State of Alabama, on said executor's final settlement of his administration in said court, upon proceedings to that end regularly instituted and prosecuted; that said decree of said probate court remains to that effect in full force and unreversed, and that more than six years, to wit, 14 years, 9 months, and 12 days elapsed since the said decrees in said probate court were rendered, and before the commencement of suit in this case. Said decrees of the said probate court are copied in the preceding plea, to which reference is made for such decrees as if they were herein formally copied.

6th. For a further plea the defendant says *actio non*, &c.;
32 because he says the decree of June 10th, 1877, mentioned in the complaint, was not a decree for the final settlement of the estate of the testator mentioned in the complaint, whereby the right of the plaintiff to have and maintain her action against this defendant as surety on the bond of the executor mentioned in the complaint; but that such right was fixed by and commenced with or before a certain decree in the probate court of Marengo county in the State of Alabama, on the second day of May, 1864, and before and hereinbefore set forth in the 4th plea to which for their contents reference is made, and which decrees were on said executor's final settlement of his testator's estate, mentioned in the complaint, under due and proper proceedings therefor, and said court was one of competent jurisdiction to determine that matter, and that it was then legally seized of it. He further says that the plaintiff's
33 right of action against the defendant as surety on the bond mentioned in the complaint commenced and existed from and after, or before the second day of May, A. D. 1864, and that more than six years, to wit: 14 years, 9 months and 12 days have elapsed from that time to the commencement of this suit, and that

the plaintiff is barred of her action thereby, and by the statute of limitations of six years in such case made and provided by the laws of Alabama.

The defendant further says that said decree of the circuit court of the United States of the 10th day of June, 1877, mentioned in the complaint, was predicated on said decree of the said probate court, and considered only that, and the equities between the aforesaid executor and plaintiff, which accrued from and after said probate court decree.

The defendant further says that said decree grew out of and was predicated on the following proceedings, to wit: Heretofore,
34 and on the fifteenth day of November, A. D. 1867, one William Lockhart and Sarah Lockhart, his wife, and Narcissa Lockhart filed their bill in said circuit court against said executor, the defendant, the different legatees, devisees, and heirs of said testator, and others, and therein alleged the qualification of said executor in said probate court; his execution with this defendant and another of the bond alleged in the complaint in this cause; that a partial settlement of said testator's estate in 1860 and a final settlement of it on May second, 1864, had been made by said probate court, which was seized of the same; and that it appeared by said proceedings in said probate court that said executor had failed to comply with his duty as such executor in this, that he had not paid to the legatees and devisees under the will of his testator mentioned in the complaint, including the plaintiff, the money in his
35 hands, which was decreed to said legatees and devisees by said decree of said probate court. The bill also complained that said executor availing himself of certain void provisions in said decrees as to the mode of paying said decrees, had, contrary to his duty as such executor, and the right of said legatees and devisees, failed and refused to pay over to them the money so ascertained and decreed to be due to them respectively; and relief against such pretenses and excuses was sought by said bill, and an enforcement of payment of said decrees of said probate court, and an executory decree therefor was prayed against said executor and this defendant as surety on his bond as such executor.

Afterwards, and upon proceedings in said cause, it was among other things, on the second day of June, 1871, decreed that said executor and the sureties on his bond, pay to the complainants in said cause, respectively, in lawful money of the United States, the
36 several amounts which were adjudged to be due them by the said decree of the probate court of Marengo county, made as aforesaid on the second day of May, A. D. 1864, and before by that of 1860, together with lawful interest thereon from said date to the date of said decree on the said bill of said Lockhart and wife, and another. It was also decreed, that the defendants in said cause, who were legatees and devisees under the will hereinbefore referred to, including the plaintiff, might make application to said court for such relief and orders as they might be entitled to ask on the prin-

ciples of said decree. And the defendant says, by the principles of said decree, it was determined that the said decree in the probate court of Marengo county, whereby the amount due to said legatees and devisees, including the plaintiff, by said executor on such final settlement of his administration, was ascertained and determined, were in so far valid, and made it legally the duty of said ex-
37 ecutor from and after the rendition of the said decree of the 2nd of May, A. D. 1864, to pay the said several amounts so ascertained to be due as aforesaid to said several legatees, including the plaintiff, and that said several legatees and distributees then and there had the right to sue for and recover the said several sums so ascertained to be due them; and that anything in said decree or decrees contrary to the exercise of this right, was null and void, and was to be treated as an absolute nullity.

The defendant further avers that afterwards, to wit, on the 10th day of June, 1871, said decree, which decree is as follows, to wit:

"Circuit Court of the United States for the Fifth Judicial Circuit and Southern District of Alabama.

FRIDAY MORNING, *June 2nd*, 1871.

Court met pursuant to adjournment. Present—the Honorable Joseph P. Bradley, associate justice of the Supreme Court of the United States.

* * * * * * * *

38 WILLIAM LOCKHART AND SARAH A., HIS WIFE, AND NARCISSA Lockhart,

vs.

JOHN A. C. HORN, LEONIDAS L. BRYAN, AND FRANCES L. BRYAN, his wife; Belton O. Nabors and Elizabeth P., his wife, and others.

This cause coming on to be heard upon the pleadings and proofs and being argued by Mr. Boyles on behalf of the complainants, and Messrs. Gibbons and Cummings on behalf of the defendant, John A. C. Horn; and the counsel of defendant having, amongst other things, objected to the jurisdiction of the court over this cause, by reason of the fact that William McPhail and Mary McPhail, two of the defendants, are citizens and residents of the State of Texas, being the same State of which the complainants are citizens; and the court being of opinion that William McPhail and Mary his wife, are not essential parties to the suit, gave leave to the com-
39 plainants to dismiss the bill as to them; whereupon, on motion of the counsel for the complainants, it is ordered and decreed that the bill of complaint be dismissed as to the defendants William McPhail and Mary, his wife; and as to other matters in controversy in the cause it is ordered, adjudged, and decreed by the court that the said bill of complaint be also dismissed as to so much and such part thereof as seeks to set aside or invalidate the last will and testament of John Horn, deceased, which was admitted

to probate by the probate court of Marengo county, of Alabama, on or about the thirteenth day of September, in the year eighteen hundred and fifty-eight, and that the complainants do pay to the defendant John A. C. Horn, the costs and expenses of taking depositions in relation to the validity of said will.

It is further ordered, adjudged, and decreed that the defendant,
John A. C. Horn, do pay to the complainants respectively,
40 in lawful money of the United States, the several amounts
which were adjudged to be due to them by the decree of said probate court, made on the second day of May, in the year eighteen hundred and sixty-four, together with lawful interest thereon from said date to the date of this decree; that is to say, the sum of twelve hundred and ninety-five ($1,295.78) dollars and seventy-eight cents, and interest, as aforesaid, to the said William Lockhart and Sarah A. his wife, and the sum of twelve hundred and seven (1,207.17) dollars and seventeen cents, and interest, as aforesaid, to the said Narcissa Lockhart; and it is further ordered and decreed that the remaining defendants be authorized to make application for such order and relief as they may be entitled to ask on the principles of this decree, and that neither party pay any costs to the other, except as hereinbefore stated and decreed.

And the defendant, John A. C. Horn, comes, by his counsel, and
prays an appeal from so much of the above decree as
41 relates to the payments to be made by him to complainants
to the Supreme Court of the United States, which is allowed on his entering into bond, with good security, in the sum of ten thousand dollars, according to the statute in such case made and provided."

* * * * * * *

was appealed from, and said cause was removed by said appeal to the Supreme Court of the United States, where said decree was affirmed and the aforesaid principles established as aforesaid were there re-declared and re-established. Afterwards, and under the provisions of said decree, the plaintiff heretofore, to wit, on the first day of April, 1874, filed her petition in said circuit court of the United States, and asked leave to come in and seek relief under the principles of the United States court decree, and have paid to her the sum or sums decreed to be due her by said executor by
the aforesaid probate court, and alleged therein that by
42 the decree of said probate court it was ascertained that John
A. C. Horn, the aforesaid executor, as such, was indebted to the plaintiff on the day of said probate decree of May 2d, 1864, and under it and its decree of 1860, the amounts ascertained by said decrees, to her, together with interest from the date of said probate court decrees, to wit, May 2d, 1864, and that of 1860, and that she had the right to have and recover the same, not only of said executor, but also of this defendant as one of the sureties on his bond as executor as aforesaid; and she brought her suit by said petition accordingly. The petition is as follows, to wit:

"In the Circuit Court of the United States for the Fifth Judicial Circuit and Southern District of Alabama, at Mobile.

"To the Honorable the Judges of said Circuit Court:

"The petition of Francis L. Bryan respectfully showeth unto your honors, that on the 15th November, 1867, William
43 Lockhart and Sarah Lockhart his wife, and Narcissa Lockhart, filed their bill in this honorable court against John A. C. Horn and this petitioner and other persons defendants therein, and a decree was rendered in said cause on the second day of June, 1871, sustaining the right of the complainants to recover certain moneys against John A. C. Horn as the executor of John Horn, deceased. And by said decree William McPhail and Mary McPhail, and Elizabeth P. Nabors and Belton O. Nabors, and your petitioner, were authorized to make application to the court for such orders and relief against said John A. C. Horn as they may be entitled to ask on the principles of said decree, touching the interest of said parties in the estate of John Horn, set forth in said cause.

"Your petitioner further states that by the decree of the probate court of Marengo county, dated May 2d, 1864, it was ascertained that John A. C. Horn, as executor of John Horn, was in-
44 debted to your petitioner on said day, for balance of proceeds of lands sold by said John A. C. Horn, and of other assets of the estate of John Horn, in the sum of nine hundred ninety-five $\frac{78}{100}$ dollars, which your petitioner alleges has never been paid to her.

"Your petitioner further states that on the second of May, 1860, a decree was rendered in the probate court of Marengo county, in favor of your petitioner against the said John A. C. Horn, as the executor of John Horn, deceased, for the sum of two thousand seven hundred $\frac{18}{100}$ dollars on a partial settlement of his accounts in said court as such executor, which sum has never been paid to your petitioner.

"Your petitioner is entitled to said sums of money, under the will of John Horn, her father, and by decree of this honorable court rendered in said cause, against the said John A. C. Horn,
45 and S. S. King, as the administrator of N. B. Lessuer, and John D. Alexander as the administrator of Joseph M. Alexander, and the said John D. Alexander in his individual capacity. The said last named persons being the sureties and the representatives of the sureties of John A. C. Horn on his bond as executor of John Horn, as appears from the pleadings and decrees rendered in said cause.

"Your petitioner further states that the sums of money so due to her under the will of her father was her separate estate under the laws of Alabama; that since said decree was rendered in this cause petitioner has been divorced from her husband, Leonidas L. Bryan, by a court of competent jurisdiction in the State of Texas, and she is now a *femme sole* and entitled alone to the proceeds of her father's estate in her own right.

"In consideration of the premises your petitioner prays the
46 court to grant her leave to present and establish her claims to said several sums of money against the said John A. C. Horn and the said S. S. King, as the administrator of N. B. Lessuer and John D. Alexander, as the administrator of Joseph M. Alexander and John D. Alexander, in his individual capacity upon this petition, and that the said persons and Leonidas L. Bryan be made parties defendant thereto and required to answer the same, and to stand to, abide by, and perform such decree as the court may render in the premises.

"And your petitioner further prays that on the further hearing of said cause your honors will grant unto her a decree for said several sums of money with interest thereon from the time that the same were respectfully due against the said parties defendants to this petition, and that your honors will grant her such other and further relief as in equity and good conscience she may be entitled to.

47 "(Signed) BOYLES & OVERALL AND
MORGAN, LAPSLEY & NELSON,
Sols. for Petitioner.

"This day personally appeared before the undersigned, a commissioner of the circuit court of the United States, Elizabeth P. Nabors, who being duly sworn, states on oath that the petitioner, Frances L. Bryan, resides in the State of Texas; that affiant has personal knowledge of the facts stated in said petition, except as to the divorce of petitioner from her husband, and the payment of the moneys therein alleged to be unpaid, as to these matters she has information which she believes to be true, and she states that as herein explained the matters stated in said petition are true.

"Subscribed and sworn to before me, this 27th November, 1873.
(Sign'd) E. P. NABORS.

[SEAL.] (Sign'd) HUGH S. D. MALLORY,
United States Commissioner for the Middle District of Alabama.

48 "Endorsed: Filed, April 1st, 1874: (S'gn'd) N. N. Trimble, clerk.

"Executed this 16th day of April, 1874, by delivering a copy of the within petition to John A. C. Horn.
(S'gn'd) R. W. HEALY,
U. S. Marshal
By E. C. McWILLIAMS,
Sp. Deputy.

"Served a copy of the within petition on W. D. Alexander, in Marengo county, April 26, '75, and on S. S. King, on April 27, '75.
(S'gn'd) R. W. HEALY,
By E. H. OLCOTT,
Sp. Deputy."

The defendant further says that afterwards and on a reference in said cause, the master of said court treated the said decree of said probate court as in full force and effect so far as the amount then due the plaintiff was concerned, and ascertained the amount due her at the time of executing the reference by taking the
49 sums so decreed to be due her by the decrees aforesaid of said probate court, and computing interest thereon from that date; and after considering the equities between said executor and the said petitioners, which arose subsequently to said probate court decrees, reported the amounts so ascertained as the amounts due to said petitioners. Afterwards this report was confirmed by said court by the decree of June 10th, 1877, mentioned in the complaint, and which decree is as follows, to wit:

"LOCKHART AND WIFE *vs.* JOHN A. C. HORN, Executor, &c.

"In the matter of the petitions of Frances L. Bryan, Elizabeth Nabors, and McPhail and wife.

"This cause came on to be heard at this term on said petitions and on the exceptions to the master's report on the petitions of Bryan and Nabors, and having been argued by counsel and considered by the court, it is thereupon ordered, adjudged, and decreed
50 that the exceptions to the master's report filed by the petitioners, as well as by the said Horn and the said John D. Alexander, be and the same are hereby overruled.

"It is further ordered, adjudged, and decreed that the petition filed by McPhail and wife be and the same is hereby dismissed as to all the defendants, but without prejudice.

"It is further ordered, adjudged, and decreed that no recovery can be had against the defendants, John D. Alexander, as an individual and as administrator of Joseph M. Alexander, deceased, and S. S. King as administrator of N. B. Lessuer, deceased; and it is therefore ordered, adjudged, and decreed, that the petitions of Frances L. Bryan and Elizabeth P. Nabors be, and they are hereby, as to the said defendants dismissed out of this court, but without prejudice.

"It is further ordered, adjudged, and decreed that the said
51 Frances L. Bryan have and recover from said John A. C. Horn, as executor of the last will and testament of John Horn, deceased, the sum of forty-two hundred and ninety-two $\frac{12}{100}$ dollars, the amount shown by the master's report to be due her, with interest thereon and costs of court, for which execution may issue.

"It is further ordered, adjudged, and decreed, that Elizabeth P. Nabors, have and recover of the said John A. C. Horn, as executor of the last will and testament of John Horn, deceased, the sum of twenty-five hundred and six $\frac{30}{100}$ dollars, the amount found to be due

her by the master's report, with interest thereon and costs of court, for which execution may issue.

June 15th, 1877.

(Sgn'd) W. B. WOODS, *Judge.*

" Filed June 15th, 1877.

(Sgn'd) N. W. TRIMBLE, *Clerk.*"

52 Which decree was based on that report, and again affirmed the validity of the decree of the said probate court as aforesaid, in so far as said decree ascertained the amount due the plaintiff, and her right to recover the same with interest thereon, from the date when said decree was rendered.

And so the defendant says, that said decrees of said probate court are and have been of full force and effect, and unreversed so far as they ascertained the amount due the plaintiff and her right to sue for the same from the date of the rendition of said decree, and if the plaintiff failed or neglected to bring suit to enforce such right of hers, and such duty on the part of said executor, other than by said petition, it was her own fault or neglect.

This defendant further says, that by said decree of June 10th, 1877, the said plaintiff failed to recover against this defendant, and her petition as against him, was dismissed; and so the de-

53 fendant says, that more than six years before the commencement of this suit had elapsed from said decree of the United States court of June 2nd, 1871, which authorized the plaintiff to sue this defendant, and more than six years had also elapsed from May 2nd, 1864, and since the said decree of 1860, and more than six years had also elapsed from and after the acts done or omitted by the said executor, which fixed the liability of this defendant as his surety to the plaintiff, whereby he is barred of his recovery by the statute laws of the State of Alabama fixing limitations of six years in such cases made and provided; and, furthermore, that the right of recovery has already been adjudged against the defendant in the cause and proceedings hereinbefore stated, and said adjudication is unreversed and in full force.

7. And for a further plea the defendant says *actio non*, &c.; because he says heretofore, to wit, on the second day of June, A. D.

54 1871, in a cause on the equity side of the circuit court of the United States for the fifth judicial circuit and southern district of Alabama in a cause pending therein, wherein William Lockhart *et als.* were complainants, and the plaintiff and this defendant as surety of this executor as alleged in the complaint and others were defendants, and under a bill to enforce the rights of the legatees and devisees under the will of John Horn, deceased, a decree therein was rendered on said date, which fixed the duty of said executor, on whose bond defendant is sued as surety to pay the plaintiff the debt sued for in this action, and her right to sue this defendant for the same, which decree is set out in a preceding plea to which reference is made for its contents. And the defendant says

that more than six years elapsed from and after the said date, and said decree before the suit in this case was commenced,
55 wherefore the defendant says that the plaintiff is barred of the recovery herein by the statute of limitations of six years in such case made and provided. All of which he is ready to verify, wherefore he prays judgment whether the plaintiff ought to have and maintain his said suit, or be answered further therein.

(10) Statute of limitations of ten (10) years in short by consent.

(S'gn'd) HERNDON & SMITH,
Defendants' Att'ys.

Filed Jan. 16th, 1880.
(S'gn'd) N. W. TRIMBLE, *Clerk.*

Demurrer to Pleas.

UNITED STATES OF AMERICA, *Southern District of Alabama.*

Circuit Court, December Term, 1879.

FRANCIS L. BRYAN *vs.* JOHN D. ALEXANDER.

And the said plaintiff says that said first plea by said defendant filed to her said complaint is not sufficient in law and for
56 cause of demurrer shows:

(1.) That the plea that said defendant did not undertake, &c., amounts only to a denial of the execution of the bond sued on, and is not verified by the oath of defendant as is required by law. (2.) That said plea is not verified. (3.) That the averment that defendant does not owe the sum sued for may not be legally pleaded to the plaintiff's complaint, and tenders no legal issue.

2. And to the said 2d plea plaintiff demurs, and for cause shows, (1) that by said plea it is not made affirmatively to appear what acts were done or omitted which fixed the liability of defendant as surety on the executor's bond of John A. C. Horn, sued on, prior to the decree against him set forth in the complaint, nor when said acts were done or omitted, nor how or in what manner plaintiff's action accrued before the said decree was rendered in 1877
57 by this court in plaintiff's favor against said executor.

3. And to defendant's 3d plea, plaintiff demurs, and for cause shows (1) that said plea fails to show or allege that at the time in said plea named, or at any other time before the said decree of June 10th, 1877, set forth in the complaint, any such decree was made as fixed the liability of said defendant as surety to respond to any action by this plaintiff on said bond, nor that any decree was at any time by said probate court made in favor of this plaintiff against said Horn, the executor, &c. (2.) That by said decree of May, 1864, in said plea pleaded, it appears that no such final decree as fixed the liability of said defendant as such surety was made in favor of plaintiff by said probate court.

4. And to defendant's said 4th plea plaintiff demurs, and for

cause shows: (1.) That said plea is uncertain in this that it
58 avers that the duty of the said executor to pay and the plaintiff's right to recover had been ascertained and declared on "and before" the 2d day of May, 1864, and does not allege at what time *before* said decree of 2d May, 1864, or how said liability became so fixed. (2.) That said plea does not show or allege that any such decree was made in said probate court in May, 1864, or in the year 1860, in favor of the plaintiff to sue for and recover her said distributive share, as enabled her to sue for and recover her said *distributive* share from said defendant as said surety. (3.) That by said probate decree, both of the year 1864, which said plea alleges was the basis of said decree of 1877, it appears [that] no such final decree was rendered for any sum of money as entitled this plaintiff then and thereupon to sue said surety, the defendant, on said bond of said executor, or as fixed his liability to her thereon. (4.) And that by said plea it appears that the
59 decree on said partial settlement of 1860 was carried into and merged in the said decree of 1877.

5. And to said defendant's said fifth plea she demurs, and for cause shows: (1.) That it fails to show or allege that any decree was rendered by the probate court in May, 1864, in favor of plaintiff, which fixed said defendant's liability as surety on said bond of said John A. C. Horn to her, said plaintiff. (2.) That by said plea, so far as it relies on the said decree of 1864, it appears that said decree of 1864 did not have effect to fix the liability of defendant to plaintiff on said bond; and that by it it appears that the decree of 1864 gave no recovery to said plaintiff against defendant's principal on said bond of said executor.

6. To the 6th plea she demurs, and for cause shows that said plea is uncertain in this, that it alleges that the liability of said
60 Alexander as security, became and was fixed on "or before" the probate decree of 1864, without alleging how or when, prior thereto, it became and was so ascertained and fixed. (2.) That it appears from the several decrees of 1860 and 1864 in the probate court and of 1871 and 1877 in this court, which are incorporated in said plea and made part of the same; that the final decree of recovery in favor of said plaintiff was first made in the decree of 1877. (2.) That so far as said plea sets up the decree of 1864, and sets the same forth as fixing the liability of said executor and his sureties, and plead the statute of limitation of 6 years therefrom is pleaded in bar of this action, said decree of 1864 show sthat it gave no recovery against the said executor which this plaintiff could enforce, and from which said statute could commence running. (3.) That said decree of 1860 was, as shown by said plea, made on a partial settlement and became merged in the final decree in
61 favor of plaintiff against said executor of this court in 1877. (4.) That it appears that neither the said decree of 1864 nor that of 1871 ascertained any specific recovery in favor of this plaintiff which she could enforce by action on said bond against the

makers thereof, and by said plea it appears that said decree of 1877 was based in whole or in part on said ascertainment in 1864 by said probate court of this defendant's distributive share, and that said plea fails to shew how great part of said recovery had by plaintiff in 1877, by said decree, was founded on any other decree than this of 1864. (5.) That it appears from said plea that said decree of 1871, upon the bill and proceedings recited therein, was made against said executor as such, and had no effect to lessen the liability of defendant on his said bond, and said decree disregarded the [—] of the probate court of date May, 1864, save so far as that
62 decree ascertained the respective shares of the complainant, distributees, and disregarded the discharge of said executor upon his complying therewith, and adjudged that he should pay to complainant distributees, their share, as by said said probate decree had been ascertained to be their due, and that said plea shews that this plaintiff did not participate in said decree save by leave reserved therein to them to ask by petition for specific relief, and that decree was not made in said cause in her favor for any specific sum of money until 1877, as alleged in the complaint. (6.) And to so much of said plea as sets up the dismissal of plaintiff's petition as against the defendant herein, shows that said plea is contradictory inasmuch as by said decree of 1877 incorporated in said plea said dismissal as to said Alexander is shown to have been made without prejudice, and that said decree of dismissal is by its terms
63 no bar to this suit. (8.) And by said plea it appears that said judgment of dismissal was not an adjudication of plaintiff's right to relief in this action. (9.) And that said plea is double and prolix and uncertain.

To the 7th plea plaintiff demurs, and for cause shows: (1) that by said plea it appears that six years have not elapsed since plaintiff's cause of action arose against defendant on said bond.

(Signed) STEWART & PILLANS,
Att'ys for Pl'ff.

Filed Jan. 16, 1880.
(Signed) N. W. TRIMBLE, *Clerk.*

Agreement of Counsel.

United States of America, Southern District of Alabama.

In Circuit Court, December Term, 1879.

FRANCES L. BRYAN *vs.* J. D. ALEXANDER.

It is hereby agreed between the parties to this suit that the
64 several decrees of the probate court of Marengo county, Alabama, and of this court, sitting in equity, which are by dates referred to and named in the several pleas by defendants pleaded, shall for all purposes be considered, as set forth in the said several pleas *in haec verba*, as often as referred to therein by name and date, and that they may be read in argument and referred to

as though written out in full in said pleas at length; and that if any appeal shall be taken from this court to reverse any judgment herein, the said decrees shall be copied into the transcript as part of said pleas from the transcripts thereof on file in the case of Horn *vs.* Lockhart, and from the record in that case, as forming a part of said pleas.

(Signed) STEWART & PILLANS,
Att'ys for Pl'ff.

(Signed) HERNDON & SMITH,
Def'ts Att'ys.

Filed Jan. 20, 1880.
(Signed) N. W. TRIMBLE, *Clerk.*

65 *Judgment.*

SATURDAY MORNING, *February* 14*th*, A. D. 1880.

Court met pursuant to adjournment. Present the Honorable John Bruce, judge of the district courts of the United States for the State of Alabama, sitting as circuit judge.

FRANCES L. BRYAN
vs.
JOHN D. ALEXANDER. } No. 599.

This day came the parties by their respective attorneys, and in this case the demurrers of plaintiff to the several eight pleas by defendant filed and pleaded herein, having been fully argued by counsel and understood by the court, it is considered by the court that the said several demurrers to each of said several pleas are well taken and that they be in all things sustained; and it is therefore further considered by the court that the said several eight pleas of the said defendant, above pleaded, and the matters therein
66 contained, are not sufficient in law to preclude the said plaintiff from having and maintaining her said action against the said defendant as he hath alleged, and it is ordered that the defendant hath leave further to answer and plead to said plaintiff's complaint, on or before ten o'clock of the morning of Monday, the 16th day of February, A. D. eighteen hundred and eighty.

Judgment.

MONDAY MORNING, *February* 16*th*, A. D. 1880.

Court met pursuant to adjournment. Present the Honorable John Bruce, judge of the district courts of the United States for the State of Alabama, sitting as circuit judge.

* * * * * * * *

FRANCES L. BRYAN
vs.
J. D. ALEXANDER. } No. 599.

67 This day came the parties by their attorneys, and the time

fixed by the rule to plead heretofore made in this cause having passed without further plea pleaded by defendant, said plaintiff prays that said defendant may answer her said complaint, and because defendant doth not further answer the plaintiff's complaint aforesaid, and sayeth nothing further, whereby said action remains against said defendant therein undefended. And because it is now here suggested and proved, and manifestly appears to the court here, that the sum of five thousand two hundred and seven dollars and twenty-six cents is justly due to plaintiff on said writing obligatory; therefore, it is considered by the court that said plaintiff have and recover of and against said defendant the said sum of five thousand two hundred and seven dollars and twenty-six cents, his debt aforesaid, and the costs in this behalf expended, for which let execution issue.

68 *Bond.*

Supreme Court of the United States.

JOHN D. ALEXANDER *vs.* FRANCES L. BRYAN.

Know all men by these presents, that we, John D. Alexander, Dan. Jones, and Thomas W. Sims, of the State of Alabama, are held and firmly bound unto Frances L. Bryan, of the State of Texas, in the sum of ($7,500.00) seven thousand and five hundred dollars, to be paid to the said Frances L. Bryan, her executors or administrators; to which payment well and truly to be made we bind ourselves, and each of us jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated this eighteenth day of February, 1880.

Whereas, the above-named John D. Alexander hath prose-
69 cuted a writ error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the circuit court of the United States for the southern district of Alabama;

Now, therefore, the condition of this obligation is such, that if the above-named John D. Alexander shall prosecute his said writ of error to effect, and answer all costs and damages, if he shall fail to make good his plea, then this obligation shall be void, otherwise to remain in full force and virtue.

(Signed) J. D. ALEXANDER. [L. S.]
" DAN. JONES. [L. S.]
" THOS. W. SIMS. [L. S.]

Sealed and delivered in presence of—
Attest:
N. W. TRIMBLE.
J. LITTLE SMITH.

STATE OF ALABAMA, *Mobile County.*

Personally appeared before me, N. W. Trimble, a U. S.
70 commissioner for the southern district of Alabama, Dan Jones, who being by me first duly sworn, deposes and says, that he is worth the sum of three thousand dollars, over and above his debts and liabilities, and legal exemptions allowed by the laws of this State, and the said John D. Alexander, being duly sworn, says he is worth one hundred thousand dollars over the exemptions allowed him by law and his debts.

(Signed) JOHN D. ALEXANDER.
(Signed) DAN. JONES.

Sworn and subscribed to before me, this 18th day of February, A. D. 1880.

(Signed) N. W. TRIMBLE,
U. S. Commissioner, Sou. Dist. Ala.

STATE OF ALABAMA, *Mobile County.*

Personally appeared before me, N. W. Trimble, a commissioner of bail and affidavits, appointed by the circuit court of the
71 U. S. for the southern district of Alabama, Thomas W. Sims, who being by me first duly sworn, deposes and says that he is worth the sum of forty-five hundred dollars over and above his debts and liabilities and the exemptions allowed by the laws of Alabama.

(Sign'd) THOS. W. SIMS.

Subscribed and sworn to before me, this the 18th day of February, A. D. 1880.

(Signed) N. W. TRIMBLE,
U. S. Commissioner Sou. Dist. Ala.

[Endorsed.]

Approved the eighteenth day of February, A. D. 1880.

(Signed) JOHN BRUCE, *Judge.*

Filed February 18th, 1880.

N. W. TRIMBLE, *Clerk.*

72 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Circuit Court of the United States for the Southern District of Alabama, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between Frances L. Bryan and John D. Alexander, a manifest error hath happened, to the great damage of the said John D. Alex-

ander, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment be therein given, that then under your seal, distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same to the Supreme Court of the United
73 States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 18th day of February, in the year of our Lord, one thousand eight hundred and eighty, and also the seal of the circuit court of the United States for the southern district of Alabama.

[SEAL.] (S'gn'd) NATHANIEL W. TRIMBLE,
Clerk of the Circuit Court of the United States for the Southern District of Alabama.

Filed in the clerk's office, this the 18th day of February, A. D. 1880

(S'gn'd N. W. TRIMBLE,
Clerk U. S. Circuit Court Sou. Dist. Ala.

74 A copy of this writ of error was filed in my office for the defendant in error on the 18th day of February, A. D. 1880.
N. W. TRIMBLE,
Clerk U. S. Cir. Ct. Sou. Dist. Ala.

75 The United States of America to Frances L. Bryan, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States of the fifth judicial circuit for the southern district of Alabama, wherein John D. Alexander is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John Bruce, judge of the district courts of the United States for the State of Alabama, sitting as circuit judge for the southern district of Alabama, this the eighteenth day of February, in the year of our Lord, one thousand eight hundred and eighty.

JOHN BRUCE, *Judge.*

76 Circuit Court of the United States for the Southern District of Alabama, at Mobile.

Personally appeared before the undersigned, a commissioner of bail and affidavits, duly appointed by said circuit court, Frank Y. Anderson, chief deputy marshal, who being by me first duly sworn, deposes and says, that on this, the 20th day of February, A. D. 1880, he served a certified copy of this citation upon Messrs. Stewart and Pillans, attorneys of record of Frances L. Bryan, defendant in error.

F. D. ANDERSON.

Sworn to and subscribed before me, this 20th day of February, A. D. 1880.

N. W. TRIMBLE,
U. S. Commissioner Sou. Dist. Ala.

Endorsed: United States Circuit Court for the Southern District of Alabama. Frances L. Bryan *vs.* John D. Alexander. Citation. Filed February 18th, A. D. 1880. N. W. Trimble, clerk.

77 Circuit Court of the United States for the Fifth Judicial Circuit and Southern District of Alabama.

FRANCES L. BRYAN *vs.* JOHN D. ALEXANDER.

I, N. W. Trimble, clerk of the above-mentioned court, hereby certify that the foregoing pages, numbered from 1 to 76, both inclusive, contain a full, true, and correct transcript of the record, proceedings, and papers in the cause of Frances L. Bryan against John D. Alexander, late pending in said circuit court of the United States for the southern district of Alabama, as the same appear of record and on file in my office; also the original citation, with the return thereon.

In testimony whereof I hereunto subscribe my name, and cause the seal of said circuit court to be affixed, this the eighteenth day of August, A. D. 1880.

[SEAL.]

N. W. TRIMBLE,
Clerk U. S. Cir. Crt. Sou. Dist. Ala.

Endorsed on cover: S. Alabama C. C. U. S. No. 233. John D. Alexander, plaintiff in error, *vs.* Frances L. Bryan. Filed 31st March, 1881.

110-411

Supreme Court of the United States,

OCTOBER TERM, 1883.

JOHN D. ALEXANDER, Plaintiff in Error,

vs.

FRANCES L. BRYAN, Defendant in Error.

In Error to the Circuit Court of the United States for the Southern District of Alabama.

BRIEF OF J. LITTLE SMITH FOR THE PLAINTIFF IN ERROR.

ASSIGNMENT OF ERRORS.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1883.

NO. 233.

JOHN D. ALEXANDER, Plaintiff in Error,

vs.

FRANCIS L. BRYAN.

Comes the above named plaintiff in error, by attorney, and says there is manifest error in this record, and assigns as cause thereof:

1st. The judgment of the court below on the 14th February, 1880, sustaining each of the demurrers of the defendant in error to each of the several pleas of John D. Alexander, the plaintiff in error, and which is found on page 21 of the Record.

Also the judgment of the court on February 16th, 1880, in favor of the defendant in error, against the plaintiff in error, for $5,207.26, and costs.

Record page 21.

J. LITTLE SMITH,

Att'y for plaintiff in error.

Supreme Court of the United States,

OCTOBER TERM, 1883.

JOHN D. ALEXANDER, Plaintiff in Error,

vs.

FRANCES L. BRYAN, Defendant in Error.

In Error to the Circuit Court of the United States for the Southern District of Alabama.

BRIEF OF J. LITTLE SMITH FOR THE PLAINTIFF IN ERROR.

The only questions for the consideration of the court are questions of law, raised by the demurrers of the defendant in error, Frances L. Bryan, to the plea of the general issue, because it was not sworn to, and to pleas filed by the plaintiff in error, in which he pleaded, under various allegations, the statute of limitations of six years, which is as follows: "Civil suits must be commenced after the cause of action has accrued, within the periods prescribed in this chapter, and not afterwards."

Within six years: * * * *

7. Motions and other actions against the securities of any

sheriff, coroner, constable or any public officer; or actions against the sureties of executors, administrators, or guardians, for any misfeasance or malfeasance whatever of their principal; the time to be computed from the act done or omitted by their principal, which fixes the liability of the surety."

Code of Ala. §§ 3223-3226.

This question is presented by all the pleas except the first, or general issue.

The complaint in this case was filed on February 12th, 1879. It was in substance as follows:

SUMMARY OF THE COMPLAINT.

It avers that the plaintiff is a legatee under the will of John Horn; that John A. C. Horn was the executor of said testator; that a decree was rendered against him as such executor in favor of the plaintiff for a sum stated, in the equity side of this court, on the 10th *June*, 1877, in a cause wherein the legatees and devisees of John Horn were complainants and said executor and the defendant John D. Alexander as a surety on his bond as such executor, et. als. were defendants. That the defendant Alexander, was a surety on said bond; that the executor had never paid said decree though he had received sufficient assets of his testator; that thereby he had failed in his duty as executor; that there was a breach of said bond, and that the surety Alexander, was liable to the plaintiff. Pleas

These several pleas admit that John A. C. Horn was the executor of the said will of John Horn, deceased; that he gave bond with the plaintiff in error as surety thereon, as alleged in the complaint, and that a decree was rendered *against said executor Horn*, in the chancery cause, described in the complaint, on the 10th June, 1877.

But they say that said decree was not the *first* decree which adjudged the amount of said decree to be due and payable to Mrs. Francis L. Bryan by said executor on account of his said administration, and that June the 10th, 1877, was not the time when the liability of Alexander, the plaintiff in error, as such surety, was *first* fixed, and the right of action of Mrs. Bryan against him *first* accrued.

Most of the pleas say, this right of action first arose *May the 2d*, 1864, which was *fourteen years, nine months and twelve days* before the commencement of this action.

The seventh plea says that in the Chancery cause of Lockart and wife vs. Horn et als, which is described in the plea, a decree was rendered on June the 2d, 1871, or *seven and a half years before this suit was commenced*, which at least fixed the duty of such executor to pay the defendant in error, as such legatee, the claim asserted in this suit, and her right to sue the plaintiff in error for the same; and that more than six years from *that time* had elapsed before this suit was commenced.

To appreciate the effect of the pleas, the substance of them respectively, may be thus stated:

The *first* plea is that the defendant in said suit did not undertake in manner and form as alleged in the complaint, and that he did not owe the debt sued for.

The *second* is, that more than six years had elapsed from the commencement of this suit from the time of any act done or or omitted by the executor Horn, which fixed the liability of the plaintiff in error as surety on the bond of said executor.

The *third* is, that the executor Horn, *on May 2d*, 1864, made a final settlement of his administration as such executor in the

Probate Court of Marengo county, Alabama, upon due and legal proceedings for that purpose; that said court had full jurisdiction over said matters, and that *on said date* it rendered a final decree on such settlement, whereby the several amounts due by said executor, as such, to the plaintiff, and the other legatees under said will, respectively, were fully ascertained, determined and declared and the liability of said executor to Mrs. Bryan was judicially ascertained, and her right fixed to prosecute her suit against the plaintiff in error, Alexander, as surety on said executor's bond, to recover the amount so ascertained and adjudged to be due her by said executor; that the defendant did not commence this suit within six years next after May 2d, 1864, when it became the duty of the executor to pay her the money so ascertained to be due her. It also avers that the decree of June 10th, 1877, against said executor Horn, is not the first decree on which Mrs. Bryan's right of action against the plaintiff in error commenced and rested; but that it rested on said decree of May 2d, 1864, and that it was rendered to enforce payment of said Probate Court decree.

The *fourth* plea is in effect the same as the third, except that it sets out the decrees of the Probate Court of Marengo county, found on pages 5, 6, 7, 8 and 9 of the Record, with an allegation that the decree of June 10th, 1877, was based on the said decrees and their validity, and is for the amounts which were ascertained and fixed by said decrees with interest thereon, from the date of their rendition, to June the 10th, 1877: that that the decree of June 10th, 1877, was merely to enforce payment of those decrees by removing certain void provision thereof; but that the right of Mrs Bryan to commence her action against the plaintiff in error, Alex-

ander, as such surety, commenced long before June the 10th, 1877, to wit: on May the 2d, 1864, and that this was more than six years before February the 12th, 1879, when this suit was commenced.

The *fifth* plea is in substance the same as the fourth plea, except that it rests, absolutely and solely, on the said decrees of said Probate Court, as fixing Mrs. Bryan's right of suit against Alexander as surety.

The *sixth* plea sets out the said Probate Court decrees; the United States Circuit Court decree of June 2d, 1871, in the case of Lockart and wife et als. vs. said executor, said Alexander as his surety, Francis L. Bryan and the other legatees under the will of said Horn, the petition of Francis L. Bryan filed April 1st, 1874, asserting the validity of the Probate Court decrees, and making the executor and Alexander parties defendants, and asking to be allowed to come into said cause *as an actor*, under the principles of the original bill; the decree thereon of June, 1877, granting relief against said said executor and ordering him to pay Mrs. Bryan the amount of the decrees of said Probate Court in lawful money of the United States; but dismissing her petition as against said Alexander because *he* had not been prosecuted to effect in said cause. [See Record, pages 12, 13, 14, 15 and 16.] The plea then avers that the decree of June, 1877, mentioned in the complaint, grew out of and was predicated on the decree of June 2d, 1871, which sustained the Probate Court decrees in all things, except as to the void order to pay their amount in Confederate States bonds, and established her right, then, at least, to sue both the executor Horn and Alexander, the surety, if she thought proper to do so; that she attempted by her petition to do so, but could not sustain her claim against Alexander because the proceedings in said cause

would not sustain her cause against him, and that, in fact, she did not sue Alexander within six years from the time when she could have done so, nor until February 12th, 1879, when this suit was commenced, or until seven years, eight months and ten days had elapsed from the time her right to sue him had been established by the decree of June 2d, 1871, although she could have sued him just as well after June 2d, 1871, as when she did sue.

The plea then sets froth the substance of the pleadings in the chancery cause of the Lockarts, and avers that the complainants therein and the petitioner, Mrs. Bryan, as shown by her petition, rested their claims on the amount decreed to them respectively in said Probate Court decrees, with interest on same, and sought to have declared void, that part of the decree which related to the mode of payment; and that such, in effect, was the principle of the decree of 1871, and it concludes with the averment that the dismissal of Mrs. Bryan's petition *without prejudice* did not and could not create any right for her to sue Alexander if her right to sue him was already barred, nor revive a right if it was then lost ; but was merely a reservation of her rights ii, in reality and fact, she then had any; and the plea concludes with asserting a bar of Mrs. Bryan's claim by the lapse of six years from the time her right accrued against Alexander before suit brought.

The *seventh* plea sets up the decree of June 2d, 1871, with the allegations that it was rendered in the aforesaid cause of Lockart under a bill to enforce the rights of the legateee and devisees under the will of John Horn, deceased, of which Mrs. Bryan was one, and that the decree fixed the duty on the executor of said will

to pay Mrs. Bryan the debt sued for in this action, and her right to sue the plaintiff in error, Alexander, for the same, and that six years had elapsed from the date of said decrees before this suit was brought.

ARGUMENT.

The court erred in sustaining the demurrer to the first plea.

The suit was not solely on the bond of Alexander, and a *conditional* promise therein to pay a sum certain. The bond itself is not the cause of action. It is a mere *inducement* to the action. The liability of Alexander is alleged to have arisen out of certain *breaches* of the bond by the principal whereby the obligation of Alexander to pay became fixed.

It is true that when the plea seeks to deny the execution by the defendant of any instrument in writing which is the foundation of the suit, it must be verified by affidavit, and when the plea seeks to do this, the want of such an affidavit may be reached by a demurrer. Code of Ala., §2989.

But the defendant is not compelled to put the execution of the instrument in issue. If he chooses not to do so, his plea leaves the instrument to prove itself, and merely sets up matters in avoidance thereof. Code of Ala., §§ 3035, 3036.

The plea is not a plea of *non est factum*. It simply disaffirms any liability for a breach of the bond *at the time the action was commenced*. The defendant thereby simply says, admitting the genuineness of the instrument, which is the inducement, to the cause of action; yet for some reason subsequent thereto, the defendant did not owe the debt claimed *when suit was commenced*. Under

such a plea at common law any matters might be given in evidence tending to show that the plaintiff had no subsisting cause of action at the commencement of the suit.

1st. Chit. Pleadi'g (marg. pp.) 472, 465.

Under our statutes therefore the execution of said bond is not put in issue by the pleas. It simply alleges, that no such obligation to pay Mrs. Bryan as she claims rested on Alexander when this suit was brought.

The Supreme Court of Alabama has thus expressed itself on the subject: "In the absence of *such* a plea the fact of execution is not in issue; it is admitted, of record, by the defendant."

Wimberly vs. Dallas, 52 Ala.. 197.

And this is affirmed by the following language, viz: "The fact of the execution of the bond by Jenkins not having been put in issue by a verified plea, must be regarded for all the purposes of this suit *as admitted.*

Bonner et al. vs. Young, 67 Ala., 39.

Suppose there were suit on a promissory note, which is the direct cause of action, and the plea of non-assumpsit were pleaded, but not under oath, is it not manifest, under all rules of pleading that the note would prove itself on its production, and that the evidence of the defendant would be confined to matters tending to show that though the note was legally executed, yet the defendant did not owe the money at the time suit was brought?

The second plea is in accordance with the provisions of the Statute of Limitations hereinbefore cited and is according to the usual forms in such cases.

2 Chitty Marg., p. 450, &c.

The court certainly erred in sustaining the demurrer to the *third* plea. It follows the rule laid down in §2987 of the Code of Alabama, which is thus stated:

"The plea must consist of a succinct statement of the facts relied on, in bar or abatement of the suit, and no objection can be taken thereto, if the facts are so stated that a material issue can be taken thereon."

The proceedings stated in this plea are all matters of fact material to the defence, and whether they existed as stated, was certainly matter on which an issue of fact could have been joined. If they did not exist as alleged, they should have been denied, and the defendant in the Circuit Court should have been put to prove his allegations. Instead of so doing, however, the plaintiff in said suit, by demurring, admits that the decree of June 10th, 1877, on which the complaint rests was not the first decree which fully ascertained and fixed the duty of the executor, Horn, to pay the money sued for, and the right of said plaintiff to sue said Alexander the surety; but that such duty and right had been ascertained by a certain decree of the Probate Court of Marengo county, Alabama, rendered in 1864, and that more than six years elapsed from that time before this suit was commenced. The plea does not set out the decree of 1864, nor any other *evidence* of the facts pleaded, but simply pleads the matters of fact as required by the above stated rule. The facts alleged undoubtedly constituted a bar, and as their truth is admitted, it is not perceived on what sound principle of pleading the plea can be held to be bad.

The other pleas may be considered as asserting two propositions:

1st. That the aforesaid decree of the Probate Court was such a *final* decree in favor of said plaintiff as enabled her to proceed *at that time*, by bill in equity or otherwise to sue said defendant Alexander for the amounts of said decrees; but that she failed to do so within six years thereafter, and within six years next before the commencement of the present suit, and that if any provisions of said decrees appeared opposed to this right the same were void.

2d. That whether the first proposition is correct or not, still that the decree of June the 2d, 1871, clearly established such duty and right in favor of Mrs. Bryan; that the adjudications in the Probate Court were adjudications of her right, to have and recover of the executor Horn the amount of the decrees *in lawful money*, and that the order of the court for the payment of said decrees *in Confederate States bonds*, was void, and also that Mrs. Bryan could, at least *then*, sue for the same, in any manner that she pleased. But if she was content to take such relief as was given in that cause against the executor, alone, she might do so. And further that she did not exercise this right to sue said Alexander, within six years next after June 2d, 1871, when such right accrued. In other words, she could then have sued both the executor Horn and the surety Alexander for the amount of said decrees, but that she failed to sue Alexander to effect within six years next thereafter, and prosecuted her suit to effect against the executor only, and that the dismissal of her suit without prejudice, did not and could not revive a lost right.

The first of these propositions seems to have been the view of the court in the said case of Lockhart et als. vs. J. A. C. Horn as executors and others. For we find the bill in that case alleged that the executor, Horn, had never fully complied with his duties

and obligations, in this: "That he had not paid those persons entitled to *the moneys in his hands, the sums* DECREED *to them* RESPECTIVELY BY SAID COURT," referring to the decrees of the Probate Court. [See page 3 of the printed record in that case.] The bill in that case clearly asserted the liability of Alexander, as surety on the executorial bond of Horn, to pay, *at that time*, the amounts of said Probate Court decrees, and the complainant's right to sue him therefor on February the 15th, 1867, when the bill was filed. For he was made a party defendant to that suit, and among other things the complainants prayed that a decree be also rendered against John D. Alexander on the bond of John A. C. Horn, given as executor of the last will of John Horn.

The whole pleadings in that case clearly show that the principle and theory set up thereby was this: That there had been such an adjudication and decree in 1864 in favor of the complainants, as *made it the duty of the executor to pay them the amounts of the decree*, and that they could not escape from that duty by setting up a void provision in the decree which was in contravention of the policy of the United States, whereby said decrees authorized the payment of a judgment for *so many dollars*, which has a specific meaning, (that is to say, lawful dollars,) *in Confederate bonds, issued to aid in the rebellion against the authority of the United States;* and such being *the duty of the executor*, and he *not having complied with such duty*, they had a right also to demand payment of the same *from the security*, whose liability was fixed by said decrees, and by the non-payment by the executor under them. I call attention to these pleadings of the said complainants as setting forth their own construction that said Probate decrees had fixed their right to have and recover the amount of them, *with interest from*

the date of their rendition, not only from Horn, the executor, but also their right to sue the surety Alexander, because said executor had not paid the amount thus adjudged in their favor. I also call attention to them, so that the nature of the decree rendered in the cause may be more clearly understood. For the decree must be referred to *the pleadings and to the principles* set up by them, since it will be observed that Mrs. Bryan was allowed to come into that case, which was commenced (before the rights set up were barred by limitation or prescription), by petition, *on the basis and principles of the decree of* 1871, *provided she elected to do so.* ✻

The *court* undoubtedly took the same view of the case. For the *decree* orders the executor Horn, "to pay to the complainants respectively, IN LAWFUL MONEY OF THE UNITED STATES, the several amounts which were ADJUDGED *to be due them by the decree of said Probate Court*, made on the second day of May in the year eighteen hundred and sixty-four, together with lawful interest thereon from said date to the date of this decree: that is to say, the sum of" &c., &c.

Then follows the authority under which the petitions were filed by the plaintiffs in April, 1874, and which is as follows: "And it is further ordered and decreed that the remaining defendants be authorized to make application for SUCH ORDER and relief as they may be entitled to ask on THE PRINCIPLES OF THE DECREE," &c.

Judge Bradley, by the language quoted, beyond question, treated the decrees of 1864, as *judgments* of the court in favor of the Lockarts. His language is "the amounts ADJUDGED *to be due* THEM."

The language of his *opinion* is no less specific. It says, "I see nothing in the case to question the accuracy of the amounts found

to be due *to the complainants* by the DECREE of May, 1864. The *question is* whether the defendant can EXONERATE himself *by paying* these amounts IN CONFEDERATE BONDS in accordance with *the decree*." But a person only *exonerates* himself from something which he is clearly under obligations to do: an onus on him.

Now, with such language, there can be no doubt that Judge Bradley considered the decrees of the Probate Court as valid adjudications *in favor of the complainants* containing void orders *as to the payment* of the amounts so "*adjudged*," and being in legal effect really adjudications *to the parties* of so much money—that is, *lawful money*.

It is exactly such a decree as was rendered by the Supreme Court of the United States in the case of Terry vs. Commercial Bank, 2 Otto, 456, when the court held that the decree was valid as to all, except *that part* which discharged the stockholders. The court said *that this part was void*, and that Terry would not be hurt if they affirmed the decree as it had been rendered, because he could not be hurt by so much of the decree *as was void*. They simply rendered it to remove all question on the subject and prevent further litigation, which the decree would have tended to produce. So in this case, the decrees were good as to all except *that which was in contravention of the policy of the United States*, and which constituted an obstacle to the *enforcement* of the decrees of 1860 and 1864.

1 Supervisors vs Stanley 105 U. S. 311.

Such also was the view of Mrs. Bryan when she filed her petition on April the 1st, 1874, to be let into said cause and asked for relief on the principles of the decree of June 1st, 1871. For the petition refers to the history of the Lockart bill and the decree of June 2d, 1871, under it, in favor of Lockart, and says:

"And in said cause a decree was rendered on the 2d of June,

1871, *sustaining* the *right of the complainant to* THE RECOVERY of certain moneys, &c. against John A. C. Horn, executor, &c., and that they were entitled to relief against said Horn such as they may be entitled to *under the principles of said decree* of 1871 "touching the interest of said parties in the estate of John Horn *set forth in said cause.* Your petitioner further states that BY THE DECREE *of the Probate Court of May* 2d, 1864, it was ascertained," &c. "Your petitioner further states that *on the* 2d *day of May*, 1860, a DECREE *was rendered* in the Probate Court of Marengo county IN FAVOR OF THE PETITIONER, against the said John A. C. Horn, as the executor of John Horn, deceased," &c.

No allegation could more plainly assert that there had been a judicial ascertainment of her rights according to the decisions of the Supreme Court of Alabama which takes the same view of this matter in the case of Bryan and wife vs. Horn, executor, 42 Ala., 496.

The case arose on the petition of said Mrs. Bryan, and her then husband, to the Probate Court which rendered said decree of May 2d, 1864, to amend and revise the said decree of 1856. The petition was granted by the Probate Court; but, on appeal, the Supreme Court reversed this decree of the Probate Court, and dismissed the petition, on the ground that the executor Horn, "in May, 1864, made a final settlement of his administration upon the estate, and at the same time filed his resignation as executor, which was ordered by the court to be filed and recorded;" and that the Probate Court had *no further jurisdiction over said matters after the final settlement of the administration of the executor and his resignation.*

It is also to be noticed that the opinion, in the case just cited, pointed out to Mrs. Bryan, as early as the January Term, 1868,

the very mode of relief sought by the bill of Lockart et als. vs. John A. C. Horn et als. Now the unreversed decision of the Supreme Court of Alabama rendered against a party respecting the decrees of the inferior courts of the State, are conclusive on that party, and on the courts of the United States where that party undertakes to raise the same question again in them. It will be observed that Mrs. Bryan did actually sue on the decree, and the Supreme Court decided that she had a right of recovery on the decree, but that such right was enforcible in a *Chancery Court* instead of in *the Probate Court*. This establishes that the liability of the surety was then existing and of course the Statute of Limitations then commenced to run, and under the principle of that, Lockart filed his bill in this court, and the petitioners came in under that bill, and under the same principles sued Alexander in those petitions.

Judge Bradley also took the same view of the question, for in stating the case made by the bill before him he says on page 136 of the printed record of that case:

"In May, 1864, the final accounts of the executor were passed in the Probate Court, after due publication of notice, and he resigned his executorship, *in accordance with the laws of Alabama.* The FINAL DECREE recites the fact that it appeared that the executor had invested the moneys of the estate in his hands in Confederate bonds, and approved and confirmed the same, and *directed* the several shares of the widow and children of the deceased to be paid to them in said bonds."

This then is also an adjudication by the Supreme Court of Alabama that the decree of 1864 was a FINAL DECREE. The question is therefore *res adjudicata. It is no longer an open one* to this court.

The legatees in whose favor the decrees were rendered, only needed to have the void provisions of the decrees as to the mode provided for the payment of the same declared void, and certainly such provisions were *declared* void at least as early as June the 2d, 1871. In fact, however, as they were void the said surety Alexander could have been sued on the valid part of the decrees, at any time from their rendition.

Why could not Mrs. Bryan have sued just as well as the Lockarts?

Indeed under the theory and practice by which they were allowed to make application for the benefit of the principles established in favor of the Lockarts in that case they did virtually sue both the executor and Alexander in that bill. All Mrs. Bryan needed to have had a decree rendered in her favor, at that time, was proper pleadings by her in that case, and it was for the purpose of allowing her to make the necessary amendment in the case for that purpose if she could do so; that the decree was made, which allowed her to make the application hereinbefore referred to and which she, in fact, subsequently made.

This rule of practice is thus stated by Chief Justice Chase in Graham vs. Railroad Co., 3 Wall., 711:

"It is true it is the constant practice of courts of equity to decree between co-defendants upon proper proofs, and under pleadings between plaintiffs and defendants, which *bring the respective claims and rights of such co-defendants between themselves under judicial cognizance.* * * * So in the case of Chamley vs. Lord Dunsany, the general litigation was for settling and marshaling incumbrances, and it was held that where a case was made out between defendants, by evidence arising from pleadings and

proof, between plaintiffs and defendants, a *court of equity was entitled to* make a decree between the defendants.

Of course, so long as she proceeded under these principles, and under the bill filed in 1867, such a change in the pleadings were mere amendments of the original proceedings, and of course related back to the time of their commencement in 1867, before there was any bar by prescription, or the statute of limitations. But that had nothing to do with the application of the statute of limitations to any *new* proceedings, like the present suit, and could not save such proceedings from the effect of such statutes.

The Lockharts failed in their suit against the surety Alexander, not because they did not have a right to sue him; but because they failed to make absolute their decree *pro confesso* against him, before the cause was submitted for a final decree.

But suppose it were an open question whether the Probate decree of 1864, was such a final decree as fixed the liability of Horn, the executor, so that Mrs. Bryan's right of action then commenced, still the decisions of the Supreme Court of Alabama hold that it was such a final decree, because it ascertained the distributive share of each distributee and ordered the executor *to pay* to each distributee the amount so found to be due to each. It shows that said executor had previously filed his accounts for a final settlement; that the same then came on to be heard and adjudicated, after due notice thereof: that said court had full jurisdiction of that matter; that the account and accompanying vouchers being audited and stated, a certain stated sum of money was found to be in the hands of the executor for distribution; that the executor had paid all the debts, discharged all the specific legacies,

and distributed the slaves according to the provisions of the will and that he had fully administered said estate. It then states the share of each legatee; the advances which the executor had made to such legatee in part payment of each share, and the exact amount then due to each, and a formal decree in favor of each the same as the following in favor of Mrs. Bryan, viz: "It is further ordered and decreed that said John A. C. Horn, executor, &c., *pay to said Frances L. Bryan the said balance* of nine hundred and twenty-five 78-100 dollars, so remaining due her as aforesaid, in bonds as aforesaid"—(Confederate States bonds.) and that "said John A. C. Horn now here files his resignation as executor of said estate, which is ordered to be filed and recorded."

The following cases show that a decree which ascertains the amount due each distributee and *orders payment* of the same by the executor or administrator is such a decree as authorizes the legatee or disatributee to sue the surety on the bond as such executor or administrator, *at once*, for the share so found to be due, and ordered to be paid. This was adjudged in

Perkins vs. Moore, Judge, &c., 16 Ala., 11, 12.
Holley vs. Acre, Judge, &c., 23 Ala., 603.

These cases were suits against a surety on the bond of an executor, in the first case, and against the surety on the bond of an administrator, in the second case. The principles decided in each case was, that on the final settlement of an executor or administrator, the ascertainment of an amount due the respective legatees or distributees and an order for such executor or administrator to pay the same, and the failure of such executor or administrator to pay as ordered, after receipt of sufficient assets to do so, is sufficient to sustain an action against such surety.

In said case of Perkins vs. Moore, the declaration, after stating a final settlement by the executor, alleged: "That on said settlement it was ordered and decreed, that Edward B. Elliott, executor as aforesaid, *pay* to Sarah J. Spencer $567.97, as by the record of said final settlement and decree remaining on file will more fully and at large appear."

The points made by the attorney for the surety were: 1. "The allegation of money ascertained by the decree to be due by the admintrator to the distributee, is not a sufficient breach."

2. "Suit cannot be sustained against sureties of an executor, on the bond at the suit of the distributee, *without* a judgment against the administrator." * * * *

6. "*The decree set out here, did not authorize a suit on the bond. What is shown is no breach of it.*"

The opinion of the Supreme Court, on appeal, says:

"We consider it settled by the decisions of this court, that a legatee or distributee may sue the executor or administrator and his securities on the bond, to recover a legacy or distributive share after a final settlement of the estate has been made in the Orphans' Court, and the amount due to such legatee or distributee ascertained by the decree of the court and ordered to be paid. Judge of the County Court of Madison vs. Looney et al., 2 Stew. & Por. 70; Judge of the County Court of Limestone vs. French, 3 Stew. & Por. 236; Same vs. Coalter, 3 do. 348. And when we reflect that the Orphans' Court has full jurisdiction to make final settlements of decedents' estates, and to decree the payments of the assets to those entitled, either as distributees or legatees, it must be apparent that when such decree is rendered, it is conclusive on

the administrator; and if he then refuse to pay the amount thus ascertained, such refusal must be a breach of the condition of his bond, which is, that he will perform all the duties required of him by law as such executor—and if there has been a breach of the bond, and the amount ascertained to which the party aggrieved by the breach is entitled, by a judicial proceeding, to which the administrator was a party, there can be no reason for requiring further proceedings, before the bond can be put in suit. This view shows, that the declaration is sufficient, as it alleges the bequest, the rendition of the final decree in favor of the plaintiff, and the refusal to pay."

In the case of Holley vs. Acres *supra*, the decree was exactly the same, and the adjudication was just the same as the case of Perkins vs. Moore. [See the decree set out in 23 Ala. Rep., pp. 603-4.] The objection (1) of the attorney for the surety was that that the proceedings of the Orphans' Court showed no decree. See p. 605, and also the answer of attorneys, Belser & Rice, p. 606, and the opinion of the court pp. 607-608. See also,

Lamkin et al. vs. Heyer et al., 19 Ala. 228.
Kyle vs. Mayan, &c., 22 Ala. 694.
Rives vs. Flinn, 47 Ala. 491.
Ward vs. Yonge, Adm'r, 45 Ala. 476.

These all show that when a demand is judicially ascertained against the executor or administrator of an estate on final settlement, it is conclusive *on him and on his sureties*. It is the duty of the executor or administrator to pay the same. It is in law a *devastavit*, for which he and his sureties are *then* chargeable, without the issuance of an execution. No demand even is necessary.

Or, as it is expressed in 47 Ala. 491, "The final settlement was an ascertainment of the extent of the administrator's liability, which fixed the liability of the sureties. They were then equally bound with himself to satisfy the decree." In the case in 45 Ala. 476, the suit was against sureties on the bond, and the court say, "the judgment against the administrator was a sufficient foundation for a suit on the bond."

These adjudications show that no particular form of decree is necessary, to authorize suit against the sureties on an executor's bond. It is sufficient that it is a judicial ascertainment of the executor's duty as such to pay or deliver the legatee's share to him or to some one for him. The decree may commit an error as to the person decreed to take or hold for the legatee, but these errors can only be enquired into by an appeal and direct revision of the decree thereby, as was the case in Lamkin vs. Huger and Rives vs. Flinn, cited supra. So that even if the question had not been *res adjudicata* by the decrees of this and the Supreme Court of Alabama, the plaintiffs might, under the cases cited, have sued the defendant on the bond, any time after May 2d, 1864, which was more than 14 years and 9 months before this suit. And in any event, that they could have so sued from and after June 2d, 1871, which was more than seven years before this suit. And taking either of said dates as the commencement of the right to sue the bar was complete.

The proceedings and pleadings in chancery cause of Lockart and wife vs. Horn et als., and the certificate to the affidavits of the petitioners, appended to their petition, show that the plaintiffs were *residents of Alabama during those proceedings, with the courts of the State open to them, which held as early as* 1870, *that an order to pay*

in Confederate bonds, or a payment therein was no payment of or discharge from a liability to a debt, fixed on a person by judicial ascertainment as shown by Pitts vs. Singleton, 44 Ala. 366.

There was, therefore, no obstacle to a successful suit against Alexander, if Mrs. Bryan had brought suit in proper time, so that if she suffers, it is by her own neglect.

In the court below the following cases, viz:—Judge vs. French, 3 Stew. & Por. 263, and Gilbreath vs. Manning, 24 Ala. 418—were cited, to show that the Probate Court decree was not such an adjudication as fixed the liability of Alexander as surety on the executor's bond.

An analysis of those decisions shows that neither one sustains the applicability of those cases to the case made by the petition, which declares there was an ascertainment and a DECREE *in favor of the petitioners of certain* amounts set out in that decree of the Probate Court.

The case of Judge vs. French, shows there was *no decree* of the Orphans' Court, *declaring the amount of the distributive fund; the names of the parties entitled* thereto, nor the *specific amount due to each:* there was simply an ascertainment that the administrator's accounts *were correct*. It was held that this was not such a judgment as would support *the allegation of the complainant*: "that there had been made, in said court, a final settlement of the estate of the executor, and that he had *been decreed to pay each distributee* seventy-five dollars and forty-five and three-fourths cents."

In the case of Gilbreath vs. Manning, the court said, the allegations of the complainant were insufficient to fix a liability on the surety and that the complaint was defective "in not stating that a *judgement* was rendered by the Orphans' Court of Marshall, in *favor of said Julia Law*, or her representative, for her distributive

share of the estate of her father, OR *an order for the payment of the said distributive share to her*, or her legal representative, by the said administrator William Black. The decree simply states, that a final settlement was had, and the share of the said Julia ascertained; but it states no judgment in her favor, *nor in favor of any one for her* for the amount," &c. And the court says, it falls within the principle decided in the case of Judge vs. French. That principle has been stated.

The principle was that there should either be a *judgment in favor of the legatee or distributee*, OR in favor of some one for her, OR *an order to pay;* but a decree or judgment in favor of the distributee would suffice, OR *a decree in the form of a simple order to pay*, would, *either one of them*, have sufficed.

But suppose that the duty of said executor to pay the amount of the said Probate decrees *in lawful money* of the United States was declared, *for the first time*, by the decree of the United States Circuit Court of June 2nd, 1871, still that established a right of recovery in some form against the executor and Alexander his surety, for the amount of both the Probate Court decrees. That was a final statement of the executors liability and for a payment in lawful money, so that Mrs. Bryan's right of action then commenced. For the amount of the Probate Court decrees were *then* actually adjudged to be correct, and that part of the decrees which authorized payment in Confederate States bonds was declared void. Then, *at least*, the statute of limitations in favor of the surety commenced to run.

The decree was only against Horn it is true, because Alexander had been let out of the suit, but the above cited cases show that was all that was necessary to fix the right of suit against the surety Alexander.

Mrs. Bryan was not compelled to have gone into the suit against the executor alone. She could have proceeded then also by suit against Alexander. She did by going into the Lockart suit attempt to sue Alexander, and the court simply held she had not in fact done so. She, however, cannot set up *her own neglect* to avoid a bar, which that neglect has made operative, and thereby avoid a statute passed for the public purpose. And a most reasonable one, when the position of the surety is considered, and the great difficulty he would generally have in proving the transactions of *a third person*. Certainly the statute has high claims on the court, when the views of the Supreme Court of the United States on the Georgia statute referred to in the case of Terry vs. Anderson, 5 Otto, 632, is considered.

As that part of the decree of June 2d, 1877, which dismissed Mrs. Bryan's petition *without prejudice*, it did not create any *new* right in her. It simply left her rights as they stood without any prejudice to them by the order, whatever they were. She never came into that proceeding any more; but sets up a new right in this suit. Even when an amendment to the bill setting up a *new right*, or making new parties is allowed, and a new right is set up by the amendment it must be considered as having been first asserted by the amended bill; and when new parties are made the suit cannot be considered as commenced against them until the amendment is filed; and in both cases the statute of limitations avails to bar the right, or protect the defendants where the period of time necessary for that purpose has elapsed. Holmes vs. Trout, 7 Peters, 213; Miller vs. McIntyre, 6 Peters, 63; S. C., 1 McLean, 85.

J. LITTLE SMITH,

Attorney for Plaintiff in Error.

110-414

Supreme Court of the United States

NO. 233.

JOHN D. ALEXANDER

VS.

FRANCES L. BRYAN.

Error to the Circuit Court of the United States, for the Southern District of Alabama.

BRIEF FOR DEFENDANT IN ERROR.

H. PILLANS,
Attorney for Defendant in Error.

In the Supreme Court of the United States.

JOHN D. ALEXANDER

VS.

FRANCES L. BRYAN.

NO. 233.

WRIT OF ERROR TO THE CIRCUIT COURT OF THE UNITED STATES

—FOR THE—

SOUTHERN DISTRICT OF ALABAMA.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

This case arises upon a common law action of debt on an executors' bond. The suit below was brought by Frances L. Bryan, a legatee, against John D. Alexander as surety on the bond of John A. C. Horn, the executor of the will of John Horn, deceased. The complaint averred that while the said bond was in full force, there was rendered in the year 1877, in the circuit court of the United States at Mobile, sitting in equity, and entertaining jurisdiction of the estate of said John Horn and of its administration and final settlement, on a bill filed by certain legatees of said John Horn against said executor and his said surety Alexander and others, a final decree in favor of plaintiff against said executor for the sum of $4,292.12 besides her costs; and that although assets sufficient had come to said executors' hands, he had wasted and converted the same and had failed to pay said decree.

Defendant below rested his defense mainly on the statute of limitations of six years in favor of such sureties, contending that said suit had not been brought against him for the sum demanded, within six years from the accrual of an action against him for the same.

To fully present this his defense in all possible lights, his pleadings were lengthy and numerous, and fully set forth the several decrees relied on to establish said defense.

To defendant's pleas demurrers were interposed and sustained, and he having failed to plead over after leave given, judgment was entered for the sum ascertained to be due to plaintiff by the decree described in the complaint, with interest.

BRIEF ON THE PLEADINGS.

THE FIRST PLEA.

This plea is clearly bad, because in its first clause it denies the execution of the bond sued on, and is without a verification. "All pleas * * which deny the execution by the defendant * * of any instrument in writing the foundation of the suit * * must be verified by affidavit."

Code of Alabama of 1876 § 2989.

And failing such verification, are demurrable.

Bell vs. Mayor, &c., 23 How. 443.
Tarver vs. Nance, 5 Ala.. 712.
Garnett vs. Roper, 10 Ala., 842.

And in its second clause it is a plea of *nil debet*. Such plea to an action on bond assigning branches is faulty and demurrable.

Reid vs. Nash, 23 Ala., 733.
Ansley vs. Mock, 8 Ala., 444.

THE SECOND PLEA

is bad as asserting a conclusion of law arising upon facts not stated by the pleader. This plea was bad on demurrer.

Winston vs. Trustees, 1 Ala., 124.
Reid vs. Nash, 23 Ala., 733.
Stewart & Fontaine vs. Hargrove, 23 Ala., 429.
Hardy vs. Bank, 15 Ala., 722.

THE REMAINING PLEAS

confess the action to be maintainable, unless the plaintiff was barred of her suit either by the statute of limitations of six years in favor of sureties or by the action of the circuit court of the United States in the decree of 1877 in dismissing her petition as against the defendant, Alexander, "without prejudice."

I.

The statute of limitations relied on is as follows.

§ 3223. Civil suits must be commenced after the cause of action has accrued, within the periods prescribed in this chapter and not afterwards.

§ 3226. Within six years * * * actions against the sureties of executors, administrators or guardians, for any misfeasance or malfeasance whatever of their principals; the time to be computed from the act done or omitted by their principal, which fixes the liability of the surety.

Can this defense be made on the decrees and proceedings pleaded?

The matters of record pleaded, show; that the executor Horn, made in the state probate court in 1860 a partial settlement, and that on that settlement the then share of Frances L. Bryan, defendant in error here, was ascertained to be $2,700.18; but that it being made to appear that a litigation was then pending in chancery between said Frances and her husband relative to her right to the possession of said property, it was ordered and decreed by that court that said executor "hold and retain * * the "balance in cash, as heretofore ascertained to be due her, "subject to the further order and decree of this court, to "be made on determination of said chancery court."

Printed record, pp. 6-7 (marg. pp. 20-22).

That in 1864, said executor made a final settlement and resigned; that on said final settlement he showed the realization of further funds from the sales of property, and his investment of the same in confederate bonds; and that said probate court ratified said investment and ascertained the shares in said further sum, of the distributees, including that of said Frances L. Bryan, and decreed that said executor "pay to said Frances L. Bryan the said balance of $925.78 "so remaining due her in (confederate) bonds as aforesaid." And that he retain the share of Elizabeth Nabors until further order.

Printed record, marg. pp. 26–28.

That in November, 1867, William, Sarah and Narcissa Lockhart filed their bill in equity in the United States circuit court, against the said executor and the different devisees, legatees, and heirs of the testator, and others, and alleged the qualification of the executor, etc., and the said partial and final settlements in the probate court having jurisdiction, and that it appeared by said proceedings in said probate court that said executor had failed to comply with his duty as such executor in this, that he had not paid to the legatees under the will, the money in his hands which was decreed to them by said decree of said probate court, and complained that the executor *availing himself of certain void provisions* in said decrees as to the mode of paying said decrees, had, contrary to his duty, etc., failed and refused to pay to them the money *so ascertained and decreed to be due to them respectively*, and relief against such pretences and excuses was sought in said bill, *and an enforcement of the payment* of said decrees.

And that in said cause in June, 1871, said court granting relief, decreed that said executor pay to said *complainants* in lawful money the amounts "*which were adjudged to be due to them* by the decree of said probate court;" and decreed, that the "defendants be authorized to make application for such order and relief as they may be entitled to ask on the principles of this decree."

Printed record, marg. pp. 34, 35, 40.

That said decree on appeal was affirmed, and that afterwards, under the provisions of said decree, the plaintiff, Frances L. Bryan, in April, 1874, filed her petition in said cause in the said circuit court, seeking relief under the principles of said decree and to have paid to her the sums decreed to be *due her* by said executor, by the said probate court, and alleged therein that by the said probate decrees of 1864 and 1860, *it was ascertained* that John A. C. Horn, as such executor, was indebted to her in the amounts ascertained by said decrees, with accrued interest, and that she had a right to recover the same from said executor and sureties, and that she was divorced from her late husband.

Record, marg. pp. 41–42–45.

That service was perfected on said petition, and the circuit court, in June, 1877, decreed on said petition that Frances L. Bryan have and recover of said John A. C. Horn, as executor, the sum of $4,292.12, with interest and costs, and that her petition as to the sureties of said executor be dismissed, but without prejudice.

II.

BRIEF OF AUTHORITIES ON THE STATUTE OF LIMITATIONS.

1. The statute in favor of sureties above quoted, begins to run only when there is a judicial ascertainment of a default by the executor.

Fretwell vs. McLemore, 52 Ala., 124–135
and cases therein cited.

"The theory on which statutes of limitation rest is, that the party to be affected by them has a right to prosecute his action from the day the bar commences. * * * * When the statute speaks of the act done which fixes the liability of the surety, * * it must be referred to this judicial ascertainment. * * * * The liability has its origin in the bond, and it is created, whenever the condition of the bond is broken, by a failure to perform the duties required by law."

Same case at pp. 136–137.

2. This judicial ascertainment must be by something more than a mere auditing of the executor's accounts, or ascertainment and decree that the distributee's share is so much, or that the distributee is entitled to so much. On such a decree no execution can issue and no action will lie in favor of such distributee, against the sureties on the bond.

Gilbreath vs. Manning, 24 Ala., 418, (cited and approved in Fretwell vs. McLemore, *supra*.)
Kyle vs. Mays, to use, &c., 22 Ala., 673.
Hughes vs. Mitchell, 19 Ala., 268.
Judge &c. vs. French, 3 S. and P. 263.

"The declaration simply states that a final settlement was had, and the distributive share of said Julia ascertained, *but it states no judgment in her favor*, nor in favor of any one for the amount, *and no order on the administrator to pay the money to any one*," wherefore it was held bad on demurrer.

Gilbreath vs. Manning, 24 Ala., at p. 420.

Hence until a decree was entered by a competent court, not only ascertaining and fixing the distributive share, *but ordering the executor to pay such share* to the distributee, the statute could not commence to run, because until then, the distributee had not "a right to prosecute his action." As demonstrated in the opinion in Fretwell vs. McLemore, *supra*, it would be absurd to so interpret the statute, as to bar a suit before the suit became maintainable.

3. It cannot be contended that the decree of the probate court on the partial settlement in 1860, (Record, pp. 5–7), conferred on Mrs. Bryan any right to sue the surety, Alexander, or fixed his liability, for the plain reason that it suspended the payment to her.

Bryan vs. Horn, exr., 42 Ala., 496,
and the cases cited above.

She was directed to the chancery forum to there seek an adjustment of her rights.

But the pleas show that the decree in the federal chancery court of 1877 (Record, p. 16), obtained by Mrs. Bryan against Horn, executor, for her distributive share of her father's estate, was founded on, as well this probate decree of 1860, as that of 1864, and ordered the payment of the sums by both decrees ascertained to be due her.

They were therefore bad, because while pleaded to the whole action, they set up a defense only good as to part, and by much the least part.

A plea which professes to answer the entire action, while it is only good as to part, is bad on demurrer.

Wittick vs. Traun, 27 Ala., 562.

So the demurrers to these pleas were even in this view properly sustained. And this argument as well applies, if either of these probate decrees were insufficient to base an action upon.

4. In how much better plight did the probate decree of 1864 place Mrs. Bryan, than did that of 1860 ?

That decree, of 1864, has been before this court in the case of Horn vs. Lockhart, reported in 17 Wallace, 570. It was, in so far as it ascertained the distributive shares of the distributees, adjudged to be a valid decree, but in so far as it sought to validate said executor's investment of the assets of the estate in confederate bonds, by ordering the payment of the said shares to be made in confederate bonds; held to be invalid.

Horn vs. Lockhart, 17 Wall., at p. 579.

As the null thing was the approval of the investment in, and the order to pay to the distributees their said shares in, confederate bonds, and as no other decree *quod recuperent* was made, it was as if that part of the decree were effaced. Yet the remainder of the decree was held to stand. It remained good as an ascertainment of Mrs. Bryan's further share at that date, in the estate, and was evidence of the debt to her, but being void in its order of payment, the failure to pay her did not amount to a devastavit, nor authorize a suit on the bond of the executor.

Hughes vs. Mitchell, 19 Ala. 268.

It was not certain *words* of the decree that were void, it was the judgment to pay bonds. The court gave no alternative judgment—if it did not decree the recovery of confederate bonds it did not decree the recovery of anything.

Horn vs. Lockhart, *supra.*
s. c. 1 Woods 628.

The distinction between this decree and that considered by this court in Terry vs. Commercial Bank, 92 U. S. 456, is too obvious to need discussion.

We can disregard what part of the court's decree it intended to make, but could not lawfully make; but we cannot make the decree speak a language different from what it did speak. We could well decline the confederate bonds it tendered us, but could not assert that it tendered us lawful money.

In discussing a similar question arising upon the construction of a statute which contained a void provision, viz., a clause making a tax deed *conclusive* evidence, the Alabama court said: "The intent is not capable of consummation. * * There can be no separation of the words—they are dependent on each other, each essential to the end proposed. If the word *conclusive* was stricken out, the enactment would be deprived of the force the Legislature intended to give it."

Doe, ex. dem. Davis vs. Minge, 56 Ala., 121.

So this court recently announced the same canon of interpretation, and held it to be an elementary principle that where the valid and the invalid parts are wholly unconnected, that which is valid may stand, and that which is invalid be rejected; but that where they are so mutually connected with and dependent on each other as to warrant a belief that they were intended as a whole, and that if all could not be carried into effect, the residue would not have been passed independently; if part be invalid the other provisions thus dependent, conditional or connected, must fall with it.

Allen vs. Louisiana, 13 Otto 80.
Liebers Hermeneutics, 120.

As all rules of interprelation are rules for the ascertainment of the intention of the writing, what reason can be suggested, for contending that a judgment is to be subjected to a different test from a statute law? They are both laws, both rules of action; the judicial sentence being a law of particular application and governing the rights and actions of the parties. But both powers, the court on the one hand and the legislature on the other, are limited; if either transcends its authority, its acts are void—what acts? why those it essayed to do and *intended* to do but could not lawfully do.

Rules for the construction of language intended to define the rights and duties of parties, must logically and of necessity be the same whether applied to the language of statute, will, or judgment. *Ubi eadem ratio ibi idem jus.*

And so in the singular case of

Kyle vs. Mays, 22 Ala., 673,

where the decree was against an administrator in favor of the "legal representative" of a distributee, the court held that such distributee, *though alive*, could not sue on the bond because the decree *as to payment* was void, and was only good as an ascertainment on which a decree might be based which would give an action.

5. Suppose then that Mrs. Bryan *had* sued this surety at law in 1865, (less than six years from 1860); her complaint must have alleged the existence of a decree, valid not only in fixing the several sums due her on said two settlements, but also valid in adjudging that the executor do presently pay them to her. Manifestly she could not have then made these averments, and must have gone out of court on demurrer as in the cases cited above.

Gilbreath vs. Manning, 24 Ala.

Kyle vs. Mays, 22 Ala.

6. The decree in the circuit court in 1871, (Record, pp. 12–13), was solely in favor of the complainants Lockhart, and manifestly in no wise bettered Mrs. Bryan's position at law. If she could not sue upon the decree of 1860, nor 1864, surely this decree gave her no action.

So that she was driven to seek in the chancery forum, (the probate court being closed to her, as we have seen *Bryan vs. Horn*, 42 *Ala.,)* relief based on these two settlements, and the amounts they respectively showed to be due to her.

Petition, p. 14, Record.

And she there obtained the decree she is now seeking to enforce the payment of. She then for the first time obtained a "judicial ascertainment of the executor's default."

III.

The order in this decree dismissing Mrs. Bryan's petition as against Alexander, was expressly made *without prejudice.* This did not bar her suit at law.

Kimball vs. County of Mobile, 102 U. S. 691.

IV.

THE JUDGMENT.

1. The demurrers being sustained, and the defendant declining to plead over, judgment *nil dicit* necessarilly followed.

Perhaps this will be assailed because judgment final was entered without a writ of inquiry.

The Alabama statute, (which by the practice act, governs), provides that:

> In all actions founded on any instrument in writing ascertaining the plaintiff's demand, if judgment by default, *nil dicit*, or on demurrer, be rendered for the plaintiff, such judgment may be entered by the clerk, under the direction of the court, without the intervention of a jury ; and the clerk must compute the interest.

Ala. code 1876, §3032.

The action here was founded upon a writing of the highest dignity, a record; ascertaining precisely the plaintiffs demand. It was therefore within the terms of the statute and its policy.

Besides, it being *in debt*, and founded on a judgment ascertaining plaintiff's demand, no writ of inquiry was requisite.

Fenton Admr. vs. Garlick, 6 Johns, 287.

And in an Alabama case, arising while a precisely similar statute to the one above quoted was in existence, (Toulmins Laws of Ala. p. 70.) the court said that where the action was in debt, plaintiff need not issue the writ but might well take judgment final; and this though plaintiffs action was not founded on a judgment.

Pettigrew vs. Pettigrew, 1 Stew. 580–588.

If erroneous action appears in the record, which did not and could not in view of the record prejudice the defendant this court will not reverse.

Grand Chute vs. Winegar, 15 Wall 355.

If no cause of action accrued to Mrs. Bryan prior to 1877 as we have attempted to establish, then the facts in the complaint remaining uncontroverted, she must in any event have been entitled to precisely the judgment she obtained below, and the appellate court will not be nice to seek technical grounds on which to base a reversal, since errors not injurious to the party complaining will not reverse.

Leonard vs. Storrs, 31 Ala. 488.
Bohannan vs. Chapman, 17 Ala. 696.
1 Brick. Dig. 780 § 96.

V.

It was urged in behalf of Alexander, on the argument below, that the decree of 1860 which retained the share of Mrs. Bryan in the executor's hands made him a trustee for her, and that the sureties on the bond became *ipso facto* released, seeing that they were sureties for an executor and not for a common trustee, and the case of *Perkins vs. Lewis, 41 Ala. 649*, was cited to support this view.

Now in the first place no plea of payment or release was under consideration. In the next, if this contention were correct, it would not show that we were barred because our

right of action accrued at the date of the decree more than six years before we sued, but that by that decree our right to hold the surety was destroyed; and no such defense was pleaded. But lastly; this case is not at all within the influence of the principles decided in Perkins vs. Lewis, because the court there merely decided that where there was a devise of lands in trust to the executor, he took as devisee and not as executor and his bond was never at any time liable for any violation of that trust. On the contrary, in matter of this decree, the Supreme Court of Alabama declared that this very money remained in the executors hands as assets of the estate, which he might have been required to pay to the admisistrator *de bonis non*, and was held "not absolutely for the distributee."

Bryant vs. Horn, 42 Ala. 496–8.
Hughes vs. Mitchell, 19 Ala. at p. 271.
Rhodes vs. Turner, 21 Ala. 210.

H. PILLANS,
For Defendant in Error.